IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 148.

WEBRE STEIB COMPANY, LTD., *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

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OPINIONS BELOW.

The Findings of Fact and the Decision, together with the supporting Memorandum (R. 30-42) of The United States Processing Tax Board of Review, wherein this proceeding began, are unreported. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 73-77) is reported at 140 F. (2d) 768. The denial of the petition for rehearing (R. 84) is unreported.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. A. Title 28, Section 347), and by the Revenue Act of 1936, Title VII, Section 906(g) (49 Stat. 1750), printed in the appendix hereto.

STATEMENT.

Webre Steib Company, Ltd., herein for convenience sometimes called Webre, was during the period from June, 1932 to January, 1937 engaged in the operation of a plantation, the growing of sugarcane thereon, the purchase of sugarcane from others, and in processing such sugarcane (R. 31). The processing, a seasonal operation beginning in October of each year and ending in December or early January (R. 31), consisted of grinding the sugarcane, extracting the sucrose, and producing a low grade of direct-consumption sugar and edible molasses by the sulphitation process (R. 31).

The Jones-Costigan Act (48 Stat. 670) was enacted on May 9, 1934 and amended the Agricultural Adjustment Act (48 Stat. 31) which was enacted on May 12, 1933. By the Jones-Costigan amendment, a processing tax was imposed on the processing of sugarcane and sugarbeets, effective June 8, 1934. The rate of tax was set by the Secretary of Agriculture at 50 cents per hundred pounds of 96° raw sugar with graduations up and down from the 96° base. On refined sugar the tax approximated 53½ cents per hundred pounds. Webre paid processing taxes in the amount of $8,169.97 (R. 34) on sugar cane processed during the months of October, November, and December, 1934 and October and November, 1935 (R. 34).

On January 6, 1936, in the case of *United States v. Butler* (297 U. S. 1) this Court declared the processing tax features of the Agricultural Adjustment Act unconstitutional. Thereafter, on June 22, 1936, the Revenue Act of 1936 was

enacted and Title VII (Sections 901 to 917 inclusive) thereof (49 Stat. 1747, et seq.) imposed restrictions on the refunding of the unconstitutional processing tax. The refund was limited to the amount of tax, if any, that the claimant had borne and not been relieved of by passing the tax on or back. Congress provided in Section 907 for a margin computation whereby the tax period was compared with a base period composed of the periods two years before the tax and six months after the tax. The margin computation took into account only the Gross Sales Value at the time of processing of the articles produced from the processing, the cost of the commodity processed, and the processing tax paid. The figure reached by deducting from the Gross Sales Value the cost of the commodity and the tax was divided by the number of units processed in the respective periods to determine the margin per unit. If the resulting margin for the tax period was lower than the margin for the base period, it created a presumption that the claimant had borne the burden of the tax to that extent, and, conversely, if the margin for the base period was lower than for the tax period, it created a presumption that the claimant had not borne any of the burden of the tax.

Fully aware that such a margin test was not conclusive, Congress provided in Section 907(e) that either the taxpayer or the Commissioner could rebut the presumption so established by proof of the *actual extent* to which the tax had been borne or shifted; and further provided that there should be no limitation on the type of proof either party could adduce.

The constitutionality of Title VII was attacked in *Anniston Manufacturing Company* v. *Davis* (301 U. S. 337) without complying with the administrative procedure provided by the said Title VII and this Court in an exhaustive opinion held that the legislation was constitutional, did not require an impossibility of proof, and that the "permissible, and we think the true, construction of Section 907(e) is that the words '*actual* extent' are used in contradistinction to

the *presumed* extent, according to the prima facie presumption to which the proof in rebuttal is addressed." (301 U. S. 355.) Mr. Chief Justice Stone (then an Associate Justice) and Mr. Justice Cardoza reserved their vote as to the constitutional or statutory rights of the taxpayer in the event that it shall be impossible to ascertain whether there has been a shifting of the tax. (301 U. S. 357-8)

Pursuant to statute Webre filed a claim for refund of the processing tax paid (R. 18-26). The Commissioner disallowed the claim, and a petition was filed with the United States Processing Tax Board of Review.

That Board, after a hearing, made findings of fact, among others, to the effect that Webre bore the burden of the tax to the extent of $3,655.82 (R. 36) and did not shift such burden in any manner whatsoever (R. 36). The Board rendered a decision that Webre was due a refund of $3,655.82 (R. 36). The amount of refund awarded by the Board was the amount indicated as borne by Webre by the margin computation (Finding No. 11 multiplied by the units appearing in Finding No. 9) (R. 35)—although the Board did not premise its decision on the presumption resulting from the margin computation.

Webre and the Commissioner each filed a motion for rehearing with the said Board (R. 42-46), but the said Board failed to act on such motions before it was abolished by statute on December 31, 1942. Thereafter, The Tax Court of the United States which had acquired jurisdiction by Section 510 of the Revenue Act of 1942 denied the said motions for rehearing (R. 47). From the decision of the Processing Tax Board both parties filed petitions for review in the Circuit Court of Appeals for the Fifth Circuit pursuant to the Revenue Act of 1936, Title VII, Section 906(g).

In addition to those just mentioned, the Processing Tax Board of Review made fact findings amongst others as follows:

(a) That at the beginning of 1933 prices had declined due to an excess of supply of sugar in the various producing countries including large stocks in the United States (R. 33); that early in the year 1933 the domestic and foreign producers, processors and refiners attempted to negotiate a stabilization agreement directed toward controlling supplies of sugar (R. 33); that, such stabilization negotiations—which had the tentative approval of the Department of Agriculture—had the effect of reducing the supply of sugar for market, and the corresponding effect of creating an increase in the price of raw and refined sugar, raw sugar advancing 85 cents per hundred pounds by mid-September, 1933 (R. 33); and

(b) That about the 15th of September, 1933, it became evident the stabilization plans would be abandoned, and the supplies of sugar that had been held in check would be, and in fact were, released (R. 33); that there was a steady decline in refined sugar prices with one slight interruption from August-September 1933 to the first week in June, 1934 just prior to the imposition of the processing tax on June 8, 1934 (R. 34); that this decline was due to a decline in raw sugar prices of 85 cents during the same period and the further contributing fact that the beet sugar crop was 300,000 tons of sugar larger than any previous crop (R. 34); that on the effective date of the processing tax there was a universal increase in the price of sugar of 55 cents per hundred pounds (R. 34); and

(c) That the processing by Webre was seasonal—October to December of each year (R. 31); that the sugar it produced was of low grade (R. 31), which because of its inferior quality was sold by sample (R. 32) at a price averaging 80 cents below the price of standard refined sugar (R. 32); that all sales were through brokers in competition with other manufacturers (R. 32); and, that the product because of poor keeping qualities was all marketed not later than May of each year (R. 32); and

(d) That Webre's statutory tax period began June 8, 1934 and ended November 8, 1935 (R. 34); that the margin for the tax period was $.01192 per unit (R. 35), for the base period $.01354 (R. 35); and that the margin for the tax period was lower than it was during the base period by $.00162 (R. 35); and

(e) That the accounts stated between Webre and its broker showed the processing tax as a separate item and as an addition to the sale price on sales of molasses (R. 35); that the said broker addressed and purportedly mailed to Webre on January 17, 1936 a letter accounting for sales of sugar the last sentence of which reads "Therefore you have not paid any more tax than you collected and these sugars in warehouse here and elsewhere, that is Chicago, or [are] really tax free."

Important too, are undisputed facts, established by the evidence, that the Board failed to find. These facts have been stipulated by the respondent for the record on review (R. 65-67). They are:

> (a) That Webre did no processing during the period six months after the tax (Par. 1, R. 66);
>
> (b) That the facts and figures set forth in the Board's finding No. 10 (R. 35) stated to represent the base period, are, in fact, applicable only to the period two years before the tax (Par. 2, R. 66);
>
> (c) That the quota system under the Agricultural Adjustment Act, as amended, was in full force and effect during the period June 8, 1934, to and beyond January 3, 1937 (Par. 3, R. 66); and
>
> (d) That the first processing done by Webre after January 6, 1936—the date of invalidation of the tax—was the processing of the 1936 crop during the period October 27, 1936 to January 3, 1937 and that the average margin for the 1936 crop computed in the same manner in every respect as the statutory margins, was $0.01582 per unit (Par. 4, R. 66-67).

The Commissioner appealed to the Circuit Court of Appeals. That Court reversed the judgment of the Processing Tax Board of Review on the ground that the universal price increase on the effective date of the tax and the broker's letter to Webre *dissolved* the presumption created by the margin computation (R. 77).

Webre appealed to the Circuit Court of Appeals on the grounds that the margin and refund determined by the Board was a minimum sum; that the findings actually made with respect to the period two years before the tax rebutted the balance of the margin that was unfavorable to Webre; and that the 1936 crop was proper rebuttal evidence and revealed that Webre bore the full burden of the tax. The Circuit Court held that the findings with respect to the two years before the tax at best would make the statutory presumption inapplicable (R. 75-6) instead of accounting for the balance, and that the 1936 crop experience could not be used as a comparison or rebuttal (R. 75).

Webre's contentions are that the Court erroneously held the statutory prima facie showing is completely dissolved and loses all probative effect upon the presentation of any evidence tending to rebut it; that the Court erred in failing to treat the 1936 crop experience as proper rebuttal; that the Court erred in failing to hold that the margin showing resulting from the two years before the tax was a minimum margin; that the Court erred in failing to hold that the variance in such factors was proper rebuttal of the unfavorable part of the margin, and that the Board's Findings require a decision that Webre bore the full burden of the tax.

ERRORS ASSIGNED.

The questions brought forward by the Petition for Certiorari encompass the following errors that are intended to be urged, and the said errors are a restatement of the errors set forth in the Brief accompanying the Petition for Certiorari:

1. The Court below erred in construing the "prima facie evidence" and the "presumption" arising from the margin computations prescribed by Section 907 as being wholly dissolved and as having no probative force when any substantial evidence tending to rebut the presumption is introduced.

2. The Court below erred in holding that the evidence submitted by the Commissioner was sufficient to rebut the prima facie showing made by Webre resulting from the margin computations made pursuant to Section 907(a).

3. The Court below erred in holding that the Commissioner could rebut the prima facie evidence arising from the margin computations in any manner other than "by proof of the actual extent to which the claimant (Webre) shifted to others the burden of the processing tax," as required by Subsection (e) of Section 907.

4. The Court below erred in overturning the Board's Finding of Fact that Webre bore the burden of the tax to the extent of $3,655.82 because this finding of the Board is supported by substantial evidence independent of the presumption arising under Section 907.

5. The Court below erred in holding that the statutory presumption would be inapplicable upon a showing that factors not considered in the computation account for the spread between the margin showing and the amount of tax paid by Webre.

6. The Court below and the Board erred in holding that the 1936 crop experience of Webre could not be used to show, by comparison with the tax period, that Webre bore a greater part of the burden of the tax than is indicated by the margin computation.

SUMMARY OF ARGUMENT.

I.

The invalidation of the processing tax features of the Agricultural Adjustment Act by this Court in *United States* v. *Butler* (297 U. S. 1) on January 6, 1936 gave rise to fiscal problems of the greatest magnitude. The Government had collected a sum approximating one billion dollars. The Agricultural Adjustment Act when enacted in 1933 was designed to raise prices, have the consumer absorb the tax, and help agriculture. A year later sugar was added to the list of basic agricultural commodities—but in this instance the declared policy was to prevent the passing on of the tax to the consumer. Section 21(d) of the Agricultural Adjustment Act had been enacted (49 Stat. 770) and provided that no processing taxes should be refunded unless the processor proved that he bore the burden of such taxes. This section was attacked in the courts principally on the grounds that no method was suggested whereby processors could prove that they bore the burden of the tax. It was necessary to devise a means to refund the taxes collected that had in fact been borne by the processor and to prevent unjust enrichment where the tax had been shifted.

No reason existed, at the time the tax was levied, for believing that recording information of the tax burden borne or shifted might be of future benefit. Still, a fair test had to be provided to protect the Revenue and do justice to taxpayers. Section 907 of the Revenue Act was designed to meet that need.

II.

Section 907, properly applied, provides a fair and just means of determining the ultimate question of whether or not the processor bore the burden of the tax, and to what extent. First it provides for a comparison of tax period results with a test period composed of the period two years

before the tax and the period six months after the tax. This test includes the primary elements needed to determine the question of tax shift. However, the period 1931 to 1936 was a period of vast economic changes. The test provided resolved a substantial number of cases, but it could not be considered conclusive, although it did constitute a prima facie showing. The statute provided further that the taxpayer and the Commissioner could each show that other factors affected the margin resulting from the comparison of the test period with the tax period. The statute suggests various factors that may be adduced to correct the margin showing, but is very specific in providing that proof shall *not* be limited to the enumerated factors. Full freedom of proof is allowed the taxpayer and the Government.

III.

The result of the margin computation under Section 907 creates a presumption of tax burden borne or shifted—either side may rebut that presumption. The presumption flows from actual evidence that is not negated by the rebuttal evidence—it is evidence, substantial evidence, of the taxpayer's experience. It is not a presumption in the ordinary sense of the term. For example, the law presumes death after an unaccounted absence of seven years and testimony establishing the fact that the person was heard from or seen during that period will dispel that presumption. It disappears because the rebutting evidence destroys the premise from which the presumption springs. Likewise, for estate tax purposes gifts made within two years of death are presumed to be made in contemplation of death, but rebutting testimony establishing the decedent's death as accidental will dissolve the presumption because the rebutting evidence removes the premise on which the presumption rests. Such is not the case with the presumption that arises from Section 907. The gross sales value is still the gross sales value, the cost of commodity is

still the cost of commodity, the amount of tax paid is still the same and so is the number of units processed. Every element or factor that gives rise to the presumption remains even though rebuttal evidence is offered. The rebuttal evidence does not destroy the presumption or the evidence from which it springs. The rebuttal evidence supplements the evidence forming the presumption and either outweighs the evidence creating the presumption or, conversely, fails to disturb the presumption.

THE PRESUMPTION ESTABLISHED BY STATUTE IN SECTION 907 IS A LEGISLATIVE PRONOUNCEMENT THAT THE MARGIN EVIDENCE, UNLESS REBUTTED, IS SUFFICIENT TO FORM THE BASIS OF A JUDGMENT. IT IS NOT A SUBSTITUTE FOR EVIDENCE.

An attack on the correctness of the factors that result in the margin presumption does not destroy the presumption—it serves to correct the presumption so that the revised figures will then create the presumption provided by the statute. A correct computation, pursuant to statute, is the only presumption the statute authorizes—there are no alternate presumptions.

Under these circumstances, the presumption and the evidence from which it springs remains in the case at all times. It is the keystone from which adjustments flow. Rebuttal evidence may modify the effect of the presumption, or it may serve as a basis from which to account for the balance of the spread in margins. It is the yardstick with respect to which all rebuttal evidence is measured.

The presumption, therefore, remains until it is overcome by other evidence—it is not dissolved nor does it disappear because the rebuttal evidence does not destroy the evidence from which the presumption flows. At best the rebuttal evidence outweighs the evidence from which the presumption springs.

In the case at bar the Court below held the presumption in favor of Webre dissolved by evidence of a price rise by the industry on the effective date of the tax, and by a purported letter from Webre's broker pertaining to sugar on hand on the date of invalidation—January 6, 1936 (R. 77).

The Court went further. It held that with the presumption dissolved "there was no other proof to support any refund" (R. 77). All the evidence from which the presumption arises was eliminated from the case; all the findings of the Board regarding the factors affecting the margin were overthrown; and the Board was sustained in its decision that the 1936 crop was not the kind of rebuttal contemplated by the statute.

By the holding of the Court below not a scintilla of evidence remained on behalf of the taxpayer. It removed from the case—instead of weighing as the Board did—all the evidence that gave rise to the presumption. We submit that the evidence—of sufficient weight to give rise to the presumption—remains as evidence to prove the actual extent of the tax burden borne or shifted, even if the presumption is lost.

The evidence on which the margin computation is based has probative value—Congress has seen fit to clothe it with primary importance. That being so, in order to comply with the theory of the holding of the Court below it would be necessary to adduce the same evidence twice in the one trial—once to establish the presumption, and again to establish the actual extent of the burden borne or shifted after the presumption has been rebutted. We do not believe that evidence, admissible for both purposes (presumption and actual extent), must be repeated to remain in the record.

IV.

The Commissioner did not rebut the presumption established by the margin computation. He offered evidence of the nature provided by Section 907 (e)(2); but the record

clearly shows—as provided by statute—that the factors accounting for such evidence were factors other than the tax.

The Commissioner offered evidence of a price increase on the effective date of the tax. The record shows that the taxpayer was not in the market at the time the price level was raised; and, that by the time Webre reentered the market four and one-half months later prices had dropped below the level prevailing the year before the tax. The Commissioner introduced correspondence that the Court below has construed as indicating a tax shift at the end of the tax period; but, the record shows that Webre received higher prices after the tax was invalidated. The record clearly shows that the price advance at the beginning of the tax period was due to the quantity control by quotas established by statute, and, that the quota system continued after the invalidation of the tax; likewise that prices instead of declining actually advanced upon invalidation of the tax.

Hence, we say that the evidence offered by the Commissioner—even though it be of the nature set forth in the statute—was, under the specific facts found by the Board in the case at bar, insufficient to overcome the prima facie presumption established by the margin computation.

V.

The Court below erred in reversing the Board in its holding that Webre bore the burden of the tax to the extent of \$3,655.82, as that decision was based on substantial evidence, and the Court below and the Board both erred in holding that the factors affecting the margin computation during the period two years before the tax and the 1936 crop experience did not constitute proper rebuttal testimony.

The respondent in his brief in the Court below rests his case entirely on the defense that the tax was passed forward to the consumer. The Government states (Br. 35).

> "There is no contention that the burden was passed back in the instant case. Our defense here is based upon

the actual showing that the processor passed the tax forward to the consumer."

We concern ourselves, therefore, only with the Findings of Fact made by the Board insofar as they bear on a forward shift of the tax.

The record discloses that: (a) the margin was \$.00162 lower in the tax period than it was during the base period (R. 35); (b) Webre did no processing during the six months after the tax part of the base period (R. 66, 75); (c) prices were low at the outset of 1933 (R. 33); (d) stabilization efforts involving a quota increased prices 85 cents per hundred pounds by mid-September 1933 (R. 33); upon abandonment of the stabilization negotiations in mid-September 1933 a decline set in which continued until the effective date of the tax and amounted to 85 cents (R. 33-34); the 1933 beet sugar crop yielded 300,000 tons of sugar more than any preceding crop (R. 34); (e) the price increase of 55 cents per hundred pounds by the industry on the effective date of the tax (June 8, 1934) (R. 34) was coincident with the establishment of quotas controlling the quantity of sugar available (48 Stat. 672-674) (infra 72-76); the quota was in effect throughout the tax period and continued in effect throughout the processing of the 1936 crop (R. 66); (f) the margin for the 1936 crop was \$0.01582 (R. 66-67) and by comparison with the tax period shows that Webre bore the entire burden of the tax; (g) the Gross Sales Value per unit of all products derived from the commodity processed amounted to: for the period two years before the tax, \$0.02973 (computed from Finding No. 10, R. 35); for the tax period, \$0.03326 (computed from Finding No. 9, R. 35); for the 1936 crop, \$0.03351 (R. 66); (h) the amount actually realized by Webre, per ton of cane ground, for the respective periods is as follows: 1932 crop, \$4.16 (R. 24); 1933 crop, \$5.55 (R. 24); 1934 crop, \$5.18 (R. 24); 1935 crop, \$5.67 (R. 24).

The foregoing facts we believe clearly establish the ultimate fact that Webre bore the entire burden of the tax, and

that the amount realized would have been realized even if there had been no tax. Likewise, that the margin computation, of itself, shows only the minimum amount of burden borne, and that such minimum supplemented by the factors enumerated above form an accounting for the full amount of the tax.

ARGUMENT.

I.

Situation Confronting Congress in Enacting Title VII of the Revenue Act of 1936 (49 Stat. 1747-1753).

The pertinent parts of Title VII, Sections 901 to 907 inclusive are set forth in the Appendix (infra pp. 56-66).

The invalidation of the processing tax features of the Agricultural Adjustment Act by this Court in *United States v. Butler* (297 U. S. 1) on January 6, 1936, gave rise to fiscal problems of the greatest magnitude. The Government, under the said Act, had collected approximately one billion dollars. In August of 1935, Congress added Section 21 to the Agricultural Adjustment Act (49 Stat. 770) pursuant to which no refunds could be made of processing taxes unless the claimant could establish that it had borne the burden of the tax. This section of the statute was attacked repeatedly in the courts, principally on the ground that no method was suggested whereby processors could prove that they bore the burden of the tax. When Title VII of the Revenue Act of 1936 was being considered by Congress, it at first contained only a general restrictive provision similar to Section 21(d). The Senate inserted Section 907 as a relief provision to processors. The presumption was created by Section 907 in order to give processors, if they chose to use it, a means of proving tax absorption. It was not intended as a further restriction on their right to a refund. This is apparent from an examination of the Senate Finance Committee Report (Report No. 2156, 74th Congress, 2nd Session, where it is said: (pages 33 and 36)

"* * * The validity of section 21(d) has been challenged in the courts in several respects. It has been contended that while that section states the conditions under which the Commissioner may deny a refund of taxes paid, it does not establish affirmatively any conditions, compliance with which will enable the claimant to secure a refund. It has been further argued that section 21(d) is so vague and indefinite as not to provide a claimant with an adequate remedy at law for a recovery of the amounts illegally exacted.

* * * * * * * * *

Section 907 of Title VII contains provisions under which a claimant may establish a prima facie case for securing a refund and sets forth definite factors and considerations to be taken into account in determining whether or not a claimant bore the burden of the tax for which refund was sought.

* * * * * * * * *

Section 907 sets forth presumptions whereby a *claimant may* make out a prima facie case as to the extent to which he bore the burden of the tax, and show that he is entitled to a refund to that extent. * * *" (Italics supplied)

Whether the claimant bore the burden of the tax or succeeded in shifting the tax was important, for the reason that the Agricultural Adjustment Act, on original enactment, was expressly designed to raise prices and have the consumer bear the tax. The declaration of policy (48 Stat. 32) sets forth three purposes: (1) to increase prices to the farmer equivalent to the purchasing power of agricultural commodities during the period 1909-1914; (2) to correct the inequities as rapidly as feasible in view of the current consumptive demand in domestic and foreign markets; and (3) to protect the consumer by adjusting production to a level that will not increase the percentage of the consumers' expenditures for agricultural commodities returned to the farmer above the 1909-1914 level. The commodities covered were such as were raised domestically—imports were absent or nominal.

This was not the case when sugar was added a year later—May 9, 1934 (48 Stat. 670). Over 70 per cent of the sugar consumed in this country is imported. The President in his message requesting the legislation (infra p. 68) stated: "Consumers need not and should not bear this tax. It is already within the Executive power to reduce the sugar tariff by an amount equal to the tax."

So that the question of who bore the burden of the tax was a vital one. In many instances the processor most likely succeeded in relieving himself of the tax; with regards to sugar, his ability to shift any part of the tax was beset with many difficulties. At the time the tax was levied, no reason existed for believing that recording information of the tax burden borne or shifted might be of future benefit. To meet the objections being interposed to Section 21 (*supra*) of the Agricultural Adjustment Act, and to protect tax payers who had borne the burden of the tax, Congress enacted Section 907 of Title VII of the Revenue Act of 1936.

The administrative departments of the Government as well as Congress recognized that sugar was in a different category than most other agricultural commodities. Following the passage of Section 907, the Bureau of Agricultural Economics prepared for the Bureau of Internal Revenue "An analysis of the effects of the Processing Taxes levied under the Agricultural Adjustment Act." This document is dated May 10, 1937 and states at page 6:

> "In the case of sugar, the control system definitely fixed the quantity of sugar made available to consumers during a given period. The processing tax, therefore, did not affect the supply of or demand for sugar in the retail markets, and hence did not affect retail prices and could not have been passed on to consumers."

II.

Section 907 of the Revenue Act of 1936.

Section 907, applied as intended by Congress, provides a fair and just means of determining the ultimate question of whether or not the processor bore any part of the burden of the tax and, if so, the extent thereof.

The broad premise of Section 907 (infra, pp. 62-66) is that any decline in unit earnings during the tax period, which is unexplained by other changes, will indicate that the processor bore the burden of the tax to the extent of the decline, while constant or increased earnings will indicate that the burden was shifted. Accordingly, the statute contemplates a comparison of earnings—or margins—during the tax period with those during a representative period before and after the tax. Section 907(a) makes a decrease in the processing margin per unit (the difference between the sales value of the article, after deducting the amount of the tax, and the cost of the raw commodity) *prima facie* evidence that the claimant bore the burden of the tax to the extent of the decrease and, correlatively, an unchanged or increased margin *prima facie* evidence that the tax burden has been shifted. However, the processing margin—even though it contains the major elements of cost and a current sales value—does not necessarily reflect all the elements or factors that result in the margin figure. Section 907(e) provides for a refinement or rebuttal of the margin obtained under Section 907(a). Either the taxpayer or the Commissioner may show that the change or lack of change in the margin was due to factors other than the tax. Section 907(e) suggests definite factors to be taken into account, but expressly states that "Such proof may include, but shall not be limited to—" the enumerated factors. The result is that either the taxpayer or the Commissioner may take account of all factors which affect the processing margin, and—except for the impossibility of reducing some factors to a dollar and cents exactness—any remaining varia-

tion must be due to the only new factor, the processing tax.

Section 907(e) in authorizing adjustment of the margins by refining or rebutting evidence uses the phrase "proof of the actual extent to which the claimant shifted to others the burden of the processing tax." This Court in *Anniston Manufacturing Co. v. Davis* (301 U. S. 337) at page 355 states:

> "The permissible, and we think the true, construction of section 907(e) is that the words '*actual extent*' are used in contradistinction to the *presumed* extent, according to the prima facie presumption to which the proof in rebuttal is addressed. In the light of the context, and of the entire scheme of the administrative proceeding, we are of the opinion that the provision was intended to afford, and does afford, full opportunity to the claimant to present any evidence which may be pertinent to the questions to be determined by the Board of Review and which may be appropriate to overcome any presumption which might be indulged either under section 907 (a), 7 U. S. C. A. § 649 (a) or otherwise."

The margin itself, is determined as follows: The "Gross Sales Value of articles" derived from the commodity processed (Section 907(b)(6)) at the time of processing is ascertained. The total quantity of each article derived from the commodity processed is multiplied by the claimants sale price current at the time of processing for articles of similar grade or quality. The value so determined may or may not be the sum realized on sale of the articles. It is the price current at time of processing. However, any material variance would be a proper rebuttal of the margin computation—it would not destroy or dissolve the margin computation—it would be a proper adjustment of one of the factors affecting the margins.

From the gross sales value there is deducted the cost of the commodity and the processing tax paid, if any, and the balance is the margin figure, which upon being divided by the number of units processed during the period results in the average margin per unit.

These factors are generally the most important single items in determining the processor's earnings, and may be taken as a starting point. The respondent in his brief to this Court in *Anniston Manufacturing Company v. Davis* (*supra*) states at page 151:

> "If, for any reason, this marginal approach is unsatisfactory, the taxpayer may, under Section 907(e), allow for demonstrated error or else adopt any other method of proof more appropriate for the facts of his particular case."

The test provided by Section 907 is the margin for the period during which a tax was paid with a base period composed of the period two years before the tax, which in the instant case is June 8, 1932 to June 8, 1934, and the period six months after the tax, that is, February to July, 1936, inclusive (Section 907 (c) (infra, p. 64)). For some commodities the test period begins as early as August, 1931. The depressed conditions existing in 1931, 1932, and 1933 are too well known to require comment, and Congress undoubtedly had this in mind when it added the period of six months in 1936. The purpose, obviously, was to balance the test period and make it more representative with the tax period. In the instant case Webre did no processing during the period six months after the tax (R. 66, 75) and, accordingly, the margins were affected. In other words, the favorable margin found by the Board was an irreducible minimum.

The comparison of the margin for the tax period with the margin for the test period created a presumption under Section 907(a). It was a starting point from which to take into account adjustments, pro and con, for factors other than the tax that affected the margin computation. Either party had the right to adduce evidence to show wherein the margin, so computed, failed to take into account any factor other than the tax. It is the fairest method yet conceived to protect the taxpayer and the Government. It

availed of mathematical exactness where available and waived such exactness where not available. For instance, gross sales value is not necessarily representative of actual realization on sale nor of the passing on of a tax, but that factor can be shown if it exists. Likewise, if the cost of the commodity cannot be determined, the statute provides (Section 907 (b)(5)) that "current prices at the time of processing" may be used. The same must be true of other factors that affect the margin—if the exact mathematical computation cannot be made, some other factor, such as another period (the 1936 crop) with like conditions, will serve to correct the margin.

The method provided by Section 907 to establish a prima facie case and to refine or rebut the margins is based upon substantial evidence, not inferences. It is evidence that without a statutory presumption is of greater weight—actual experience instead of inferences—than exists in many cases in which courts must approximate damages and give judgment.

III.

Effect of the Presumption Arising Under Section 907.

The Court below disposed of the presumption created by the margin computation partially favorable to Webre in the following language: (R. 76)

> "We adhere to our ruling in the *Bain Peanut Company* case that the statutory presumption, when rebutted, disappears entirely from the case; and if there is no proof *aliunde* the presumption, the taxpayer, upon whom the burden of proof lies, must suffer an adverse decision."

The Court below then held (R. 77) that:

> "This evidence clearly was sufficient to dissolve the presumption, and since there was no other proof to support any refund, the claim should have been disallowed in its entirety."

All the evidence adduced by Webre with respect to margins, the factors influencing the margin during the tax period, the period two years before the tax, and the 1936 crop margins, were removed from the case, and the record in the eyes of the Court below was bare of any evidence.

The Court below, in holding as it did with respect to the effect of rebutting evidence on the presumption, followed its previous holding in *Commissioner* v. *Bain Peanut Company* (134 F. (2d) 853). The Court below denied a Petition for Rehearing with a written opinion (134 F. (2d) 858) wherein the majority held that the presumption created by Section 907 is of the nature dealt with in *Mobile, J. & K. C. RR. Co.* v. *Turnipseed*, (219 U. S. 35) held valid by this Court, and distinguishes that case from *Western & Atlantic Railroad Co.* v. *Henderson* (279 U. S. 639) wherein this Court held a statutory presumption invalid. From these two decisions the majority concluded that a statutory presumption is *unreasonable* which is given the effect of evidence to be weighed against opposing evidence; and that such a presumption, as between private parties, would violate the due process clause of the 14th Amendment if created by a state statute and the same clause of the 5th Amendment if created by an Act of Congress. The Court conceded that there was no question of due process in the *Bain* case, "but merely a question as to the weight and character of the presumption that Congress intended to create, [but] the difference in the nature of the two presumptions is persuasive in arriving at the legislative intent."

We believe that the Court below missed the real distinction between the presumption upheld in the *Turnipseed* case and the one held to be invalid in the *Henderson* case; and the distinction between both of those cases and the presumption arising under Section 907.

The true distinction between the *Turnipseed* and *Henderson* cases does not support the Court below in its distinctions as advanced in the opinion denying the Petition for Rehearing in the *Bain* case.

The *Turnipseed* case and the *Henderson* case each gave rise to a presumption resulting from a railroad accident—a derailment in the former and a collision at a crossing between the train and a motor truck in the latter. In the *Henderson* case the lower Court held the presumption of negligence remained in the case after testimony refuting negligence was adduced even though no evidence of negligence was offered by the plaintiff. This Court held the statute invalid. In the *Turnipseed* case this Court held the statute valid when applied to this particular case stating in continuation of the part relied on by the Court below in the *Bain* case:

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.
>
> * * * * * * * * *
>
> Tested by these principles, the statute as construed and applied by the Mississippi court in this case is unobjectionable. It is not an unreasonable inference that a derailment of railway cars is due to some negligence, either in construction or maintenance of the track or trains, or some other carelessness in operation."

So that the *Turnipseed* case is, in fact, authority for the presumption remaining in the case, and not for the dissolution of the presumption.

In the *Henderson* case, nineteen years later, this Court in declaring the statute as construed by a Georgia Court invalid followed the same reasoning, stating at page 642:

"Legislation declaring that proof of one fact or group of facts shall constitute prima facie evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property, * * *.

The mere fact of collision between a railway train and a vehicle at a highway grade crossing furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company, or of the traveler on the highway, or of both, or without fault of any one."

More recently in *Tot v. United States* (319 U. S. 463) (decided June 7, 1943), this Court reaffirmed its position on statutory presumptions, stating at page 467:

"Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection."

The *Turnipseed* case held that the presumption was not dissolved, but was to be considered along with *all* the evidence.

The distinction between the presumption springing from Section 907 and the two railroad injury cases (*Turnipseed* and *Henderson*) is more pronounced than the distinction between the two latter cases. The presumption springing from Section 907 is not an inference that by legislative fiat presumes a state of fact not reflected in the evidence but inferred or deduced from a primary fact. Nor must we look for a rational *connection* between the fact proved and

the ultimate fact presumed. It is much stronger. The presumed fact, *that the claimant bore or did not bear the burden of the tax*, is established by a complete chain of evidence—the margin computation—that results in the fact that the Congress has clothed with the force of a rebuttable presumption. There is no hiatus—no gap between the proven fact and the presumed fact. THE PRESUMPTION ESTABLISHED BY STATUTE IN SECTION 907 IS A LEGISLATIVE PRONOUNCEMENT THAT THE MARGIN EVIDENCE, UNLESS REBUTTED, IS SUFFICIENT TO FORM THE BASIS OF A JUDGMENT. IT IS NOT A SUBSTITUTE FOR EVIDENCE. If the presumption is rebutted by sufficient evidence, the presumptive effect may or may not be overcome by such rebuttal evidence—depending on the strength of the rebuttal evidence. In any event, the evidence that gives rise to the presumption is not excluded from the case. It does not disappear with the successful rebuttal of the presumption. In the two railroad cases (*Turnipseed* and *Henderson*) the injury, the collision and the derailment did not disappear as evidence—neither does the margin computation under Section 907. In the *Henderson* case there was a failure to sustain a cause of action because no evidence existed to take the place of the presumption; in the *Turnipseed* case the presumption of negligence was weighed with the other evidence, the derailment, to determine liability.

Under Section 907 the margin evidence remains in the case even if on consideration of all of the evidence the presumption is overcome in whole or in part. The Board's decision that Webre bore the burden of the tax to the extent of $3,655.83 was based on the margin evidence (R. 35, 36) (The amount appearing in Finding number 11 multiplied by the units appearing in Finding number 9) and the Court below erred in holding that there was "no proof *aliunde* the presumption."

This Court in *Anniston Manufacturing Company v. Davis* (301 U. S. 337) recognized the probative value of the margin computation, stating at page 354:

"But it cannot be said that the comparisons set up between the results of operations during the 'tax period' and the 'period before and after the tax' are wholly irrelevant."

Our view is that the presumption and the evidence from which it springs remain in the case at all times as a starting point from which to measure the effect of the rebuttal evidence, whether such evidence be for the purpose of showing that the margin and the presumption do not reflect the full burden borne, or, whether it be for the purpose of showing that the margin and the presumption overstate the amount of tax burden borne.

Such evidence may be capable of exact mathematical computation and account for the difference between the tax paid and the margin showing with mathematical exactness as was done in *Regensburg* v. *Helvering* (130 Fed. (2d) 507) (2 C. C. A.); or, it may account for the difference or spread by adducing evidence that the entire base period is not alike in all respects with the tax period, as was done in *Epstein* v. *Helvering* (120 Fed. (2d) 427) (4 C. C. A.); or, it may be done by advancing another period that is alike in all respects with the tax period, as was done in *Arkwright Mills* v. *Commissioner* (127 Fed. (2d) 465) (4 C. C. A.); or, the presumption may prevail over conflicting rebutting evidence by both parties to the litigation as the majority of the Court held in *Helvering* v. *Insular Sugar Refining Corporation* (141 Fed. (2d) 713) (D. C. Appeals). In the latter case, the third member of the Court in a dissenting opinion (page 719) held that the presumption was eliminated from the case by the rebuttal evidence, but that the evidence of margins giving rise to the presumption remained in the case as evidence "entitled to no artificial weight."

In not one of the four cases above referred to, reviewed by three different Circuits, was the presumption held to be dissolved. In the one case decided on the presumption—*Insular Sugar Refining Co.*—the presumption was weighed

along with all the evidence. In the other three cases the presumption was overcome and the evidence that gave rise to the presumption remained in the case.

Analyzing these four cases applying Section 907 and the *Anniston* case decided by this Court in the order in which they were decided, we find:

Anniston Manufacturing Company v. *Davis* (301 U. S. 337) decided May 17, 1937: The Government in its brief to this Court, answering the Petitioner's objections to the presumption created by Section 907, gives the following view: (Br. 152-153)

> "Petitioner specifically objects to the presumption based on a comparison of margins because it fails to take into account the possibility of changes in other processing costs (Br. 43-45). It should first be noted that this omission cannot injure the claimant, for he may show these changes under Section 907 (e) and thus modify the result obtained through comparing the margins. The contention thus reduces itself to the assertion that it is irrational to ignore these factors in making the first step which, until explained by further evidence, is *prima facie* evidence of shifting or absorbing the tax burden. So clarified, the contention requires no extended answer. If Congress had required that all of the factors which might affect the processing margin be included, the procedural utility of the presumption would wholly be lost."

The Government appears to agree with us that the margin computation and the presumption is "the first step". It does not suggest that the presumption disappears when rebutted—quite the contrary—it believes "he may show these changes under Section 907 (e) and thus modify the result obtained through comparing the margins."

This Court in deciding the case discusses the presumption at pages 354 to 356, but due to the nature of the case refuses to enter into a speculative inquiry; although it does conclude that the presumption is rebuttable, that the rebuttal proof is not limited, that the words "actual extent" are

used in contradistinction to the "presumed extent", and that the claimant may present any pertinent evidence which may be appropriate to overcome the presumption.

Epstein v. Helvering (120 Fed. (2d) 427) decided by the Fourth Circuit on June 10, 1941: This case pertained to the processing of tobacco. The statutory margin computation was adverse to the claimant, but the Board found that the claimant changed to a popular priced cigar in the period six months after the tax. The Circuit Court analyzed the margins and held that the margin for the period two years before the tax, considered alone, indicated a full absorption of the tax by the claimant. The Circuit Court reserved the question of the effect of the presumption, reversed the Board, and held the claimant entitled to a refund of the full tax paid. In so holding it relied upon a comparison of the margins for the period two years before the tax with the tax period as well as other Findings of the Board. With reference to the complete base period, that is the period before the tax and the period after the tax, the Court said (page 430):

> "It is manifest from these figures that a comparison of the statutory margins does not furnish a reliable method for the solution of the issue in this case. Such a method is of no value unless, throughout the successive periods, all the factors, except the tax, entering into the manufacture and sale of the goods remain constant."

It is to be noted that here, although the Court did not pass on the effect of the presumption, it considered and left in the case the evidence from which the presumption arose. It is clear that the Court considered important, if not controlling, the fact that a margin computation for the period before the tax indicated a complete absorption of the tax.

Arkwright Mills v. Commissioner (127 Fed. (2d) 465) was decided by the Fourth Circuit on December 18, 1941. This case involved the processing of cotton. The margin presumption was adverse to the claimant and upon taking into

account increased expenses the margin remained adverse (p. 467). The claimant contended that the intensity of demand existing in the tax period accounted for the adverse margin to the extent of the adverse margin and about one-third of the tax—that increased demand brought about an increased margin, and that selling prices on a rising market increase faster than costs. In support of this contention the taxpayer advanced the period January 1, 1936 to June 30, 1938 in which the cost of commodity, processing costs and demand were about the same as in the tax period. The Board rejected this evidence and the Fourth Circuit reversed. The Court did not discuss the effect of rebutting the presumption but it approved the claimant's method of adjusting the statutory margin, stating at page 469:

> "The next step was to apply these conclusions to the facts of the case by adjusting the statutory formula for marginal comparison so as to make allowance for the greater intensity of demand that existed in the tax period as compared with the statutory base period. The demand was the same in the tax period as it was in the thirty month period, and, therefore, the demand in the latter period was compared with the demand in the statutory base period. This was done by comparing the net margins, i.e., the gross margins, less manufacturing costs, in the two periods. The net margin in the statutory base period was subtracted from the net margin in the thirty month period, and the difference was attributed to the greater demand in the last mentioned period. By this method the amount by which the greater demand increased the margin in the tax period was calculated, and the opinion was finally formed that the taxpayer bore the burden of the tax in the minimum sum of $79,152.17.

The Court reasoned thus: (page 468)

> "In the first place it is manifest that the statutory test, which Congress itself devised, involves a comparison of the taxpayer's actual position during the tax period with what it would have been if there had been no tax. Section 907 (a) requires a comparison of the margin

in the tax period with the margin in the base period before and after the tax. If the margin is lower in the tax period, the presumption is that the taxpayer has borne at least a part of the tax. Clearly, this test assumes that all the factors except the tax which affect the margins are the same in both periods, for otherwise the comparison would not show whether the taxpayer bore the burden or not; and this assumption involves the very sort of hypothesis which the Board condemns. That this is true is recognized by high authority. See Statement of Secretary of Agriculture Wallace before Finance Committee on Title VII of the Revenue Act of 1936, Hearings before Committee on Finance, United States Senate, 74th Congress, 2nd Session, on H. R. 12, 395, p. 859; Ferger on Windfall Tax and Processing Tax Refund, American Economic Review, March, 1937, p. 52.

Moreover, there is no novelty or vice in the hypothetical approach to the ascertainment of a person's rights or the extent of damage wrongfully imposed upon him. Valuation of property involves the ascertainment of a hypothetical selling price. Breach of contract often involves a hypothetical loss of profits. Personal injury often requires an estimate of earnings that would have been made had the injury not occurred. Frequently the investigation of these matters is of such difficulty that mathematical certainty in the determination of amounts is impossible; but rights are not lost thereby, and it becomes the duty of the courts to find the relevant facts and to base a reasoned judgment upon them."

Here the Court did not eliminate from the record the evidence from which the presumption arises. It permitted the use of that evidence to measure the adjustment in a period outside the statutory period. What is also important is the fact that the court considered as relevant a period outside the statutory period because the factors were shown to be the same as those existing in the tax period.

E. Regensburg & Son v. Helvering (130 F. (2d) 507) decided by the Second Circuit on August 3, 1942. It involved the processing of Tobacco. The statutory margin

computation was adverse to the claimant and the presumption was that the tax had been shifted. The claimant advanced four factors other than the tax to account for the spread in margins. The Board decided such factors were not a proper rebuttal. The four factors were each reduced to an exact mathematical computation and together accounted for more than the spread between margins. The four factors that the Board refused to consider were: a reduction in cost of tobacco, an increase in the percentage of yield of the filler, a decrease in the duty, and two Christmas seasons that fell in the tax period compared to one in the base period.

In this case the Circuit Court construed the presumption in the following language: (page 508-9)

> The caption of § 907 is "Evidence and presumptions," and § 907 (e) speaks of the "prima facie evidence" as a "presumption." This might mean that, as soon as the claimant had put in any evidence, the office of the presumption was over; or it might mean that the claimant had the burden of proof. That question was reserved in Epstein v. Helvering, 4 Cir., 120 F. 2d 427, but we must decide it here. We think that "presumption" cannot in this connection mean burden of proof because the claimant has that burden anyway; on the other hand the section can hardly mean merely to set up a presumption, because no presumption is necessary against one who has the burden of proof. True, a claimant would be helped by a presumption when the "margin" for the "tax period" is less than that for the "base period," but if no more than that was meant, it is difficult to see why it should have been necessary to speak of any "presumption" when the spread between "margins" was against him. For these reasons we think that the section could not have used presumption in the strict sense, but that it meant that when the spread between "margins" is against the claimant, even though he may in general have otherwise satisfied the conditions of § 902, 7 U. S. C. A. § 644, he must show that the spread was not owing to his shifting the tax.

and then proceeded to analyze each of the four factors adduced by the claimant by ascertaining the extent to which they accounted for the adverse margin and the tax absorbed. The Court started with the adverse margin and termed the difference between that figure and the amount needed to show an absorption of the tax as the "spread" in margins. It did not exclude the margin evidence once the presumption was rebutted—it used the margin evidence and the presumption as a starting point, tested each factor adduced, and held that the Board erred in not considering them.

In reversing the Board and remanding the cause, the Court had this to say with respect to each of the four factors: (page 510)

The reduction in cost of tobacco and in the duty:

> "Unless the decline in price was caused by the tax, such an interpretation [that the cost is already considered in the margin computation] would defeat the general purpose of the act, which was to reimburse those who had paid and who had not indemnified themselves indirectly. A fall in the price of the raw material which would have occurred, tax or no tax, is not such an indemnity; the claimant's loss through the tax cannot be said to have been made good by a profit which he would have enjoyed quite as certainly, if there never had been any tax.
>
> * * * * * * * * *
>
> For these reasons we think that any decrease in the cost of raw tobacco and in the duty were proper elements to absorb what remained of the spread between 'margins'."

The increase in the percentage of yield from the filler and the extra Christmas season:

> "* * * when the increase in 'gross sales value' is not owing to the claimant's raising his selling price, but to some economy in manufacture disconnected with the tax, or to an accident over which he has no control, there is no reason to deny him the same right to count

it in absorbing the spread between 'margins,' which he has to a decrease in the cost of the commodity. The higher yield from the tobacco and the extra Christmas season were increases of that kind and, so far as proved, should be credited against the spread."

Helvering v. Insular Sugar Refining Corporation (141 F. (2d) 713) decided March 27, 1944 by the United States Court of Appeals for the District of Columbia. This case related to the processing tax on sugar. The margin computation created a presumption that the claimant bore the tax burden to the extent of about fifty per cent. The Government's rebuttal testimony was of the same type as it advanced in the case at bar, that is, the price rise by the industry—while the claimant was out of the market—on the effective date of the tax and correspondence relating to the tax shift. In the Insular case the correspondence was much stronger than the isolated letter the Court below relies on in the case at bar. The Board decided the Insular case on the presumption and was sustained by the Court of Appeals. The Court stating at pages 715-716:

> "* * * the burden of showing "the extent" of the shifting—if indeed shifting is shown by selling in a current market as to which claimant had no part in making or controlling—is, in the admitted facts of this case, by the statute put on the Commissioner, and it is perfectly clear he has not met it, and in that case the statutory average marginal formula must be applied if the Act of Congress is to be given effect."

The dissenting member of the Court held that the "presumption was 'out of the case' as soon as proof was introduced which would support a finding that claimant shifted the entire burden of the tax" but

> "The difference in margins was not eliminated from the case, but it was only evidence, entitled to no artificial weight."

These four cases, all controlled by Section 907—decided by three different appellate Courts—all retain as relevant

the evidence from which the presumption arises. Furthermore, this Court considers such evidence relevant and it is quite clear that no Court has eliminated the presumption created by the margin computation. The Government in the *Anniston* case, the Second Circuit in the *Regensburg* case, and the Fourth Circuit in the *Arkwright* and *Epstein* cases, have considered the margin computation as the starting point from which adjustments are to be made. And the District of Columbia Court of Appeals in the *Insular* case, after weighing the rebuttal evidence, relies on the presumption.

We believe the Fifth Circuit erred in holding the presumption dissolved in the case at bar, and in further holding that there is "no other proof to support any refund" (R. 77).

We conclude our argument on his phase of the issues with this observation. Assuming arguendo that the Fifth Circuit has correctly construed Section 907, so that by the production of evidence tending to rebut the presumption, the presumption is dissolved and the evidence from which the presumption arises is likewise eliminated from the record. Assume further, that the margin and presumption was against the claimant, and that the rebuttal evidence adduced by the claimant was similar to that in the *Regensburg* case, that is, a precise accounting for the margin spread. Under the foregoing conditions the presumption would be rebutted and the margin computation along with the presumption would be removed from the record. On what basis would the taxpayer recover? We submit that on the Fifth Circuit's theory the taxpayer would be unable to recover because he has done no more than rebut the presumption—he has not established that he bore any of the burden of the tax for the reason that the rebuttal is all anchored to the presumption and the margin computation—which is now eliminated from the case. No foundation or starting point exists from which to measure the affirmative burden. The record would show that there were two Christmas seasons

during the tax period. But that fact has no significance unless it is measured by some other fact. With the record void of the number of Christmas seasons in any other comparative period what difference can evidence of the number of Christmas seasons in the tax period make? Must the taxpayer again introduce as evidence the margin computation for the statutory base period in order to have a comparison? Can the taxpayer introduce some other comparative period as Webre did by showing the 1936 crop experience? Does the statutory base period lose all probative value because the presumption has been rebutted? The same rationale applies to the three other factors that account for the spread in margins in the *Regensburg* case.

The only theory upon which the Fifth Circuit can be sustained in its construction of Section 907 is to hold that, on the production of evidence tending to rebut the presumption, the cause must be tried *de novo*. And how is a litigant to know that he must proceed *de novo* unless the trier of the case (the Board Member) first holds that the presumption has been rebutted? Supposing that at some stage of the proceeding, the Board Member directs that the presumption has been rebutted. Must the litigant proceed *de novo* even though the full Board upon consideration of the Member's Findings should hold that the presumption was not rebutted? We do not believe that Section 907 is intended to set successive traps to defeat the claimant.

The foregoing example brings into bold relief the impossible situation created by the Fifth Circuit, but it serves no purpose unless it is reconciled with the situation that prevails in the ordinary case of presumptions. The distinction is clear. The ordinary presumption is not based on evidence—it is a presumed fact serving in lieu of evidence, and the claimant favored by the presumption is aware that upon the presumption being met by evidence he must produce evidence to fill the gap caused by the presumed fact being dissipated. But under Section 907 the litigant has already produced such evidence. The margin computation

is the evidence of his own experience from his own records. That is why we say on the theory of the Fifth Circuit that the evidence must be submitted *de novo*, or, if such evidence loses all probative value—which we are reluctant to believe—what alternative evidence will make it possible for a litigant to recover the illegal exaction?

We believe the conclusion inevitable that the presumption established by statute in section 907 is a legislative pronouncement that the margin evidence, unless rebutted, is sufficient to form the basis of a judgment. It is not a substitute for evidence. Upon rebuttal, the margin evidence and the presumption both continue to remain in the case to be weighed along with all of the evidence.

IV.

The Commissioner Did Not Rebut the Presumption.

The Board in Findings numbered 10 and 11 found the margins for the tax period and the base period (R. 35); and in Finding number 11 found that the margin for the tax period was \$.00162 per unit lower than it was during the base period (R. 35).

The rebuttal evidence of the Commissioner is contained in the last paragraph of Finding number 6 (R. 34) and in Finding number 12 (R. 35-36). The last paragraph of Finding number 6 reads as follows: (R. 34)

> "Universal increases in the sale price of sugar were effected on the effective date of the Jones-Costigan Amendment to the Agricultural Adjustment Act, hereinabove referred to, by \$.55 a hundred pounds, to cover the amount of tax imposed by said amendment to the act."

and Finding number 12 reads as follows: (R. 35-36)

> "All of the accounts stated between the petitioner and its broker, E. A. Rainold, Inc., respecting sales of molasses made through that broker included the processing tax as a separate item and as an addition to the

sale price of the article. An account sale, typical of all such accounts, respecting the sales of sugar, made through its said broker, bore the following:

Golden Ridge, 100 Pkts. 10,000 # @3.71¢ $371.00
F.O.B. Pltn, Tax Pd.
Tax 0.526¢

The figures 0.526¢ was the prevailing rate of processing tax at or about the time of the rendition of said account.

The following paragraph is from a copy of a letter of E. A. Rainold, Inc., addressed and, purportedly mailed, to the petitioner on January 17, 1936:

'According to memorandum you furnished us on processing tax you paid on 298,017 pounds of sugar, and we have accounted to you for these [three] cars of 800 pockets and part car of 300 pockets and when we get paid for the balance of this part car, or 500 pockets, it will total 3200 pockets or 320,000# in which the processing tax was included in the price. Therefore you have not paid anymore tax than you collected and these sugars in warehouse here and elsewhere, that is Chicago, or [are] really tax free.' "

The Board concludes its Findings of Fact with Finding number 14, reading as follows: (R. 36)

"The extent to which the processing tax paid and borne by the petitioner and not shifted to others in any manner whatsoever is $3,655.82."

From the foregoing Findings the Court below concludes: (R. 77)

"* * * there was no showing that this policy of shifting the burden of the tax, thus shown to exist at the beginning and end of the tax period, did not continue throughout the effective period of the taxing statute. This evidence clearly was sufficient to dissolve the presumption, * * *."

We do not believe that the Court below was correct in holding that the foregoing evidence was sufficient to over-

come the presumption created by the statute because the Board had other evidence before it that negated the conclusion adopted by the Court below. Section 907 (c)(2) provides that:

> "Proof that the *claimant* * * * changed the sales price of the article * * * by substantially the amount of the tax * * *; but the claimant may establish that such acts were caused by factors other than the processing tax * * *." (Italics supplied)

The record shows that the claimant did not increase prices and that the increase by the industry was due to factors other than the tax.

> The Universal increase in the price of sugar by $.55 a hundred pounds on the effective date of the tax—June 8, 1934.

Claimant's position on June 8, 1934: Webre was entirely out of the business of processing or marketing sugar on June 8, 1934. There is not a scintilla of evidence to indicate that it was concerned about the price of sugar in any manner whatever on that date. On June 8th its operations were confined to the growing of sugarcane on its plantations. Therefore, it did not increase its price of sugar on that date.

The 1933 processing season extended from October 23rd to December 7, 1933 (R. 31). The processing had ceased seven months before the tax effective date. The 1934 processing season did not begin until October 29th, 1934 (R. 34) —a period of four and one-half months after the tax effective date.

The sugar produced by Webre "was of low grade, it was of a slightly higher grade than raw sugar" (R. 31). "Due to its tendency to revert to liquid form with the advent of warm weather, however, it was necessary to market its product as soon after processing as possible, usually not later than May of each year following the grinding season." (R. 31-32) All of its sugar was sold by sample (R. 32) and

the crop from which the processed sample would of necessity be made was still growing on June 8, 1934 in the plantations of Webre and the growers from whom Webre purchased cane. These crops did not mature until four and one-half months after the tax effective date (R. 31).

We think the record is clear that for a period of seven months before the tax Webre did no processing; and, for at least one month before the tax date Webre had no sugar to sell. Not only did Webre have no sugar to sell on the tax date, but, it had no sugar to sell for the next four and one-half months. It is obvious that Webre did not raise prices on the tax effective date—because it was not in a position to sell sugar—for the simple and compelling reason that Webre had no samples to tender.

Industry price situation on June 8, 1934: It is clear that Webre was not in the sugar market in any manner whatsoever on June 8, 1934; and the fact is contrary to the holding of the court below that Webre had "participated in a universal increase in the selling price of sugar, effective as of the moment the processing tax was imposed" (R. 77).

There was an increase of $.55 per hundred pounds in the quoted price of sugar by the industry on the date of June 8, 1934. This is not denied. But the record shows clearly that such rise was due to factors other than the tax. Section 907 (c)(2) expressly provides "that the claimant may establish that such acts were caused by factors other than the processing tax." Addressing ourselves to the position of the industry as distinguished from the claimant, and assuming that—even though Webre's sugar was sold by sample—Webre's price followed a set discount from the industry price, we find the following facts:

At the outset of 1933 the price of raw sugar was at a low of $2.80 (R. 33); and voluntary quota and stabilization negotiations were instituted with the tentative approval of the Department of Agriculture. Prices of raw and refined sugar advanced—raw sugar advancing from $2.80 to about $3.65 by mid-September 1933 (R. 33). This is an increase

of 85 cents on prospects of a quota compared to an increase of 55 cents on the taxing date when statutory quotas became operative (infra, pp. 72-76). About mid-September, 1933, the voluntary quota efforts were abandoned, supplies held in check were released (R. 33), and there was a steady decline in refined sugar prices (R. 34) lasting until the first week of June, 1934 (R. 34). This decline was due to a decline in raw sugar prices of 85 cents (R. 34) accentuated by the size of the beet sugar crop which was 360,000 tons of sugar larger than any preceding crop (R. 34).

On June 8, 1934 the effective date of the tax the industry advanced prices 55 cents. There are a number of factors other than the tax that influenced prices before and on June 8, 1934, but they do not appear of record in this case—so we refrain from discussing them. However, on June 8, 1934, the quota system of control became operative by statute (infra, pp. 72-76). It is clear that the price movement was controlled by the quota. It dominated all other factors. At the beginning of 1933, large excess supplies caused extremely low prices (R. 33); then came an advance of 85 cents on the prospects of the quantity being controlled (R. 33); and a decline of 85 cents when the voluntary control failed (R. 34).

All of this price disturbance was remedied, because the legislation effective on June 8, 1934 provided for a strictly controlled quota (infra, pp. 72-76) and on June 21, thirteen days after the taxing date the Philippine quota was filled. The Philippine quota amounted to 1,015,186 tons, or about 16 per cent of the annual United States consumption (Report of the Agricultural Adjustment Administration (1934) (pp. 162-165).

The price advance in list prices on June 8, 1934 of 55 cents, coincident with a strict quota control, was 30 cents less than the advance of 85 cents the year before on prospects of a quota system. It was 30 cents less than the decline that followed the abandonment of a voluntary quota control.

We believe the claimant has met the requirements of Section 907 (e)(2) and established that the price advance of the industry on June 8, 1934 was due to factors other than the processing tax.

Webre's actual experience: We have demonstrated that Webre did not raise prices on June 8th, 1934; and we have established that the increase in the list price by the industry on June 8th was due to factors other than the processing tax. We now carry the record one step further and demonstrate that the price advance by the industry was entirely lost by the time Webre reentered the market late in October, 1934.

The realization by Webre from the sale of all products derived from the sugarcane processed for the 1933 crop—the year before the tax—amounted to \$5.55 per ton of cane (R. 24); and for the 1934 crop the realization was \$5.18 per ton of cane (R. 24). During the first year of the tax Webre realized 37 cents per ton less than it did in the year before the tax. The 1935 crop year was composed of the tax period in part and in part of the period for which the tax was not paid. The realization per ton of cane was \$5.67 (R. 24) and is slightly higher than the year before the tax but bear in mind this was after the excess supplies had been eliminated from the market. In fact:

> "It became apparent in October 1935 that the marketings of sugar as contemplated by the quotas would exhaust the normal year-end stocks of refiners and would result in the closing of some refineries during part of December unless remedial action was taken." (Report of the Agricultural Adjustment Administration, 1933 to 1935) (p. 216).

Approaching the question from the margin angle the Gross Sales Value for the entire tax period was \$.03326 per unit (\$75,055.63 divided by 2,256,676) (R. 35) and the Gross Sales Value for the 1936 crop was \$.03351 per unit (R. 66). The quota system remained in effect during the 1936 crop (R. 66).

It must be apparent that Webre has established the fact that the increase in price by the industry in June 1934 was due to factors other than the tax; that such increase was not realized by Webre in marketing the 1934 crop; and that prices were higher after the tax was invalidated than during the tax period, furthermore, the *margin computation* reflects current prices, therefore includes all price increases.

We conclude, therefore, that the June 8th price increase was not a rebuttal of the margin presumption.

Purported letter of January 17, 1936 and form of account stated.

The Court below reached the conclusion that the form of account between Webre and its broker (not the customer) (R. 35) and the letter of January 17, 1936 from the broker to Webre (R. 35-36) establishes that the tax was being shifted at the end of the tax period (R. 77).

The account form indicates nothing more than the fact that the sugar was tax paid. Bearing in mind that Webre produced a grade of sugar "of a slightly higher grade than raw sugar" (R. 31) and that only direct-consumption sugar was subjected to a processing tax (48 Stat. 671), it was necessary that the broker be in a position to say that the sugar was tax paid. The account sales does not show a separate billing of the tax—neither does it show a deduction of the tax for the purposes of computing a brokerage. It indicates nothing more or less than the fact that the sugar was tax paid sugar.

The letter of January 17, 1936 was written eleven days after the invalidation of the tax by this Court. The law in effect at that time was Section 21(d) of the Agricultural Adjustment Act and it provided that the claimant could recover the tax only if he had borne the burden of the tax. If the claimant had any unsold tax paid sugar, it was entitled to a refund on such sugar. That is obvious because on unsold sugar no one but the processor could bear the burden of the tax. The letter does nothing more than ac-

count for the tax paid sugar and advises Webre that all the tax paid sugar has been sold. The carlessness of the wording of the paragraph is apparent from the two bracketed errors appearing therein.

We submit that this letter is not of sufficient weight to overturn the decision of the Board. The Board, we must assume, considered this letter in reaching the conclusions that Webre bore the burden of the tax to the extent of $3,655.82.

The Commissioner did not rebut the presumption.

Our position is that the sugar industry would have liked to have shifted the tax but did not succeed in doing so. Counsel knows of cases, not now before this Court, where the claimant hoped for an increase of $1.25 on June 8, 1934 —53½ cents to cover the tax and the balance to cover the decline that preceded the tax. However, the presumption and margin evidence and, most of all, the actual realization are controlling whereas the hopes and intentions are not. In *C. B. Cones & Son Mfg. Co. v. United States* (134 F. (2d) 539) the Seventh Circuit, in disposing of a floor stocks tax case under the Agricultural Adjustment Act, had this to say about correspondence and intentions (page 533):

> "The most unfavorable inference which can be drawn from the correspondence is that plaintiff might have, prior to the effective date of the tax, considered or even intended to include it in its sales price. We are of the view, however, that plaintiff's intention or motive is immaterial. Certainly it is not controlling. The question at issue must be determined on the basis of what was actually done."

The statute provides that the presumption may be rebutted "by proof of the actual extent" to which the tax was borne or shifted. We believe as this Court held in *Anniston Manufacturing Co. v. Davis* (301 U. S. 337) at page 355 that the words "actual extent" are used in the statute in contradistinction to the presumed extent, accord-

ing to the prima facie presumption to which the proof in rebuttal is addressed. We also believe that the words "actual extent" should be construed liberally—but they should not be construed in a manner that will overcome the presumption by the mere introduction of evidence of a frivolous nature. The evidence deemed sufficient to overcome the presumption should be substantial and of weight sufficient to prevail over other evidence. Of what value is evidence of a price increase if other evidence establishes that the price realized during the tax period was no higher than the price realized in the year before the tax? Of what value is correspondence that might indicate a tax shift at the end of the tax period if the record shows higher prices prevailing after the tax period?

Hence, we say that the evidence offered by the Commissioner—even though it be of the nature set forth in the statute—was, under the specific facts found by the Board in the case at bar, insufficient to overcome the prima facie presumption established by the margin computation.

V.

The Claimant in the Case at Bar Has Rebutted the Presumption That the Margin Computation Reflects the Full Burden of the Tax Borne.

The theory of Section 907 is that by a comparison of the major elements entering into the making of a profit during the tax period with similar elements for a representative period a starting point is established by which to measure the tax burden borne or shifted. Unless all the factors, excepting the tax, are alike to the same degree, the comparison fails to disclose the full burden borne or shifted. (*Epstein v. Helvering* (120 Fed. (2d) 427). However, the margin computation does establish a solid foundation from which to measure the adjustments necessary to a determination of the ultimate question.

Some cases, such as *E. Regensburg & Sons v. Helvering* (130 Fed. (2d) 507), lend themselves to a precise computation accounting for the spread in margins; others, such as *Epstein v. Helvering (supra)*, give the answer to the ultimate question by excluding part of the comparison shown to reflect different factors; still others, such as *Arkwright Mills v. Commissioner* (127 Fed. (2d) 465), form the basis for the ultimate fact by comparison of the tax period with another period upon a showing that the statutory comparative period is not representative.

If the two periods selected by the statute are not a fair comparison, that fact can be shown, and by whatever means is then available, the tax burden borne or shifted can be established.

In the case at bar, we believe that the method provided by Section 907 (a) shows the minimum tax burden borne by Webre. We base this statement on a showing of factors existing in the tax period that did not exist in the comparative period provided by statute; and we establish the fact that Webre bore the full burden of the tax by a comparison with the 1936 crop—a period in which all factors excepting the tax were alike.

The Government in its brief defending the constitutionality of Section 907 in *Anniston Manufacturing Company v. Davis* (301 U. S. 337) states at page 151:

> "If, for any reason, this marginal approach is unsatisfactory, the taxpayer may, under Section 907 (e), allow for demonstrated error or else adopt any other method of proof more appropriate for the facts of his particular case."

The authorities, excepting the Court below, appear to be very much in agreement that Section 907 offers full opportunity to determine the ultimate question by assailing or adjusting the basic computation provided by that section. We proceed, therefore, to demonstrate why the basic margin computation reflects only the minimum burden of tax

borne by Webre; and then to demonstrate by comparison with a representative period that Webre bore the full burden of the tax. We refer to the 1936 crop which the Board and the Court below excluded from consideration.

At the outset we point out that the statute contemplates that the burden of the tax may be shifted backwards or forwards—however, in the case at bar the Government in its brief to the Court below concedes that the tax was not passed back and affirmatively argues that the tax was passed on. The Government states (Br. 35):

> "There is no contention that the burden was passed back in the instant case. Our defense here is based upon the actual showing that the processor passed the tax forward to the consumer."

We address ourselves, therefore, to the record insofar as is necessary to establish that the burden of the tax was not shifted forward.

The presumption reflects the minimum tax burden borne by Webre.

The Court below excluded from consideration all the evidence we are about to review on the theory that the presumption was dissolved and that "there was no other proof to support any refund" (R. 77). The margin computation and all evidence relating to it was in effect stricken from the record. We have heretofore argued that the Court committed reversible error in so holding, therefore, we will not renew the argument but proceed to a discussion of the evidence.

(a) *Margins*: The Board finds that the margin for the tax period was \$.01192 per unit; that the margin for the base period was \$.01354; and that the margin for the tax period was \$.00162 lower in the tax period than it was during the base period (R. 35). The number of units processed during the tax period was 2,256,676 (R. 35); therefore, the lower margin with no adjustments indicates a tax burden borne

of $3,566.82 (R. 36). This figure is arrived at by multiplying $.00162 (the decrease in margins) by 2,256,676 (the number of units processed in the tax period).

(b) *The base period is incomplete*: The statutory base period is composed of the period two years before the tax—in this case June 8, 1932 to June 7, 1934—and the six months after the tax, February to July 1936 inclusive. We must assume that Congress took due notice that the period two years before the tax was a period of severe depression and that the period six months after the tax was added to balance the period, thereby making the entire base period more representative of the tax period. The tax period, June 8, 1934 to November, 1935 (R. 34), was a period during which the country was emerging from the depression.

Webre, being a seasonal processor, did no processing between the dates of December 6, 1935 and October 27, 1936 (R. 31); therefore, it did no processing during the statutory period after the tax (R. 66, 75).

The statute recognizes this possibility and provides in Section 907(c) that under such circumstances:

> "the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, *where necessary for a fair comparison*, be substituted in making the necessary computations." (Italics supplied)

There is no other concern engaged in "a similar business and similarly circumstanced." That is natural in a seasonal business processing an agricultural product immediately after harvesting. Webre made its sugar by the sulphitation process "which is continuous for sugarcane to the finished product, there being no intermediate stage at which raw sugar, as such, is produced" (R. 31). However, the inability to produce representative concerns for the purpose of improving the presumption and margin does not preclude giving consideration to the fact that, because of

that reason, the presumption and margin show a minimum amount of burden borne instead of a likely amount.

(c) *Prices were low at the outset of 1933*: (R. 33) The base period in the case at bar started on June 8, 1932. Webre's first processing was from October 17 to December 20, 1932 (R. 31). Prices were extremely low at the outset of 1933 (R. 33).

> "The processing tax on sugar became effective on June 9, 1934, as one part of a four-phase program in aid of growers in the United States and Cuba. This program was initiated almost exactly 4 years after the Tariff Act of 1930, under which the duty on Cuban sugar had been increased from 1.765 to 2 cents per pound, raw value. Although this increased the price of sugar in the United States relative to world prices, both domestic and world prices continued to decline after June 1930, and reached an all-time low in 1932." (Italics supplied) (An Analysis of the Effects of the Processing Taxes levied under the Agricultural Adjustment Act—Prepared by the Department of Agriculture for the Bureau of Internal Revenue, page 66)

There was an "excess supply of sugar in the various producing countries, including large stocks in the United States" (R. 33). The amount realized by Webre on the 1932 crop amounted to $4.16 per ton of cane compared to $5.55 cents per ton in the succeeding year (1933) (R. 24).

We believe it a reasonable conclusion that under the foregoing circumstances the year 1932 included in the margin computation and the presumption establishes that the margins derived therefrom are subnormal and a minimum instead of representing a fair comparison.

(d) *Prospects of a voluntary quota increased prices in 1933*: In the spring of 1933 an effort was made by refiners, processors, and growers to control the supply of sugar (R. 33). All domestic and foreign interests were represented (R. 33). The Department of Agriculture encouraged the procurement of an agreement (L. 33). Prices of raw and

refined sugar advanced while supplies were held in check (R. 33). Raw sugar advanced 85 cents by mid-September (R. 33); then the plans were abandoned, supplies released, and prices declined 85 cents (R. 33-34). The quantity of sugar overhanging the market was aggravated by the largest beet sugar crop on record—300,000 tons larger than any preceding year (R. 34). During the tax period the quota control was in effect—it was part of the statute making sugar a basic agricultural commodity (infra, pp. 72-76).

This evidence establishes several factors that influenced the margin comparison. It is to be noted that the rise, beginning in spring, culminated in September. Webre did no processing between the dates of December 30, 1932 and October 23, 1933 (R. 31) so that none of this rise is included in the Gross Sales Value in the base period margin computation for Webre. The decline beginning in mid-September was under way for five weeks before Webre started processing so that the Gross Sales Value at the time of processing by Webre for the second year of the base period includes values much below the maximum. These two deductions from the price movement establish that the statutory margin computation represents a minimum tax burden borne.

This price movement having a material adverse effect on the Gross Sales Value entering into the margin computation also adversely affected Webre in the cost of commodity. Webre was a substantial grower of sugarcane and the declining raw sugar price naturally did not reduce the cost of growing cane; whereas the cane purchased by Webre was purchased after the decline was under way five weeks and ceased no later than December 7, 1933 (R. 31) when the decline still had six months to run. High prices for cane and low prices for the sugar quite naturally narrow the margin during the base period. That is one reason why we contend that the statutory margin computation reflects a minimum amount of tax burden borne.

This evidence also measures the effect of the quota system of quantity control. On prospects of a quota, prices

advanced 85 cents (R. 33); and on abandonment of the plan, prices declined 85 cents (R. 33-34); whereas, on the actual imposition of quotas on June 8, 1934, prices advanced only 55 cents (R. 34). The deduction to be drawn from this evidence is quite obvious—the imposition of quotas did not immediately remove the excess supplies, although it did prevent a bad situation from becoming worse, and gradually acted as a corrective. The price advance of 55 cents on June 8, 1934 was due to the quota control. Furthermore, the advance did not hold because Webre realized less per ton of cane from the 1934 crop—$5.18 per ton (R. 24)—than it did from the 1933 crop when $5.55 per ton was realized.

(e) *The tax period:* The quota system of control became operative on the effective date of the tax (infra 72-76) and the industry succeeded in temporarily raising prices 55 cents a hundred pounds (R. 34). Within thirteen days importations from the Philippines ceased (Report of the Agricultural Adjustment Administration (1934) (pp. 162-165)). The quota continued in effect for the period six months after the tax, that is, the period February to July 1936 (R. 66). By October, 1935 the excess supply of sugar was eliminated; in fact, refiners were threatened with a shutdown for lack of sugar. The Report of the Agricultural Adjustment Administration (1933 to 1935) p. 216) states:

> "It became apparent in October 1935 that the marketings of sugar as contemplated by the quotas would exhaust the normal year-end stocks of refiners and would result in the closing of some refineries during part of December unless remedial action was taken."

Here the record shows that the tax period is a contrast instead of a comparison with the statutory base period; also that Webre's base period confined to the two years before the tax failed to reflect the quota and the elimination of the excess supplies during the period six months after the tax.

Conclusion: Each of the five factors set forth above are a proper rebuttal of the statutory presumption and the margin computation. They do not dissolve the presumption nor is the evidence out of the case. They very definitely establish that the tax burden borne is greater than the presumption and the margin computation would indicate. They establish that the presumption and the margin computation establish the minimum amount of tax burden borne.

We believe they also establish that Webre bore the entire burden of the tax—although we have not been content to rest on that. The record shows that the 1936 crop affirmatively establishes that Webre bore the entire burden of the tax.

The 1936 crop experience has probative value to establish, and does establish, that Webre bore the entire burden of the tax.

The Board held that the 1936 crop could not be used to establish the tax burden borne—that it "tends in no way to establish either a prima facie case under the statute or to rebut the prima facie case established by other proof" (R. 40). The Court below held that the 1936 crop served no purpose because the claimant "could not take any other periods for purposes of comparison" (R. 75).

The statute imposes no limitation on the proof to be offered in establishing the actual extent of the burden borne by the claimant—in fact, it specifically recites that proof shall not be limited to the enumerated factors (infra 65). The Fourth Circuit approved the use of a period of thirty months in *Arkwright Mills* v. *Commissioner* (127 Fed. (2d) 465). This period of thirty months included only six months of the statutory base period. The Government in its brief to this Court in *Anniston Manufacturing Company* v. *Davis* (301 U. S. 337) advised this Court that the taxpayer may "adopt any other method of proof more appropriate for the facts of his particular case" (Br. 151). This

Court in *Anniston Manufacturing Company* v. *Davis* (*supra*) held that Section 907 (e) was: (P. 356)

> "intended to afford, and does afford, full opportunity to the claimant to present any evidence which may be pertinent to the questions to be determined by the Board of Review and which may be appropriate to overcome any presumption * * *."

Pertinency of the 1936 crop: The 1936 crop represents the first processing done by Webre after the tax period (R. 31). The conditions during the processing of the 1936 crop were similar to those existing in the tax period. The quota system of control remained in effect (R. 66). The excess supplies existing in the period two years before the tax (R. 33) had been eliminated. Section 907 (e) of the statute indicates that the statute contemplates periods that offer "a fair comparison" (infra 64). The base period in this case has been shown to reflect conditions that do not offer a fair comparison. A margin computation based on the 1936 crop is, we believe, pertinent under the circumstances set forth above.

The margin for the 1936 crop, computed in the same manner in every respect as the statutory margins, is \$0.01582 per unit (R. 66-67). The margin for the tax period is \$0.01354 (R. 35). The margin for the tax period is \$0.00228 lower than the margin for the 1936 crop and "reveals that the petitioner [Webre] bore the burden of a greater amount of tax, by \$1,131.14, than it actually paid" (R. 39).

Margins based on a comparison of the tax period with the 1936 crop establish that Webre bore the full burden of the tax.

Viewing the question from the angle of endeavoring to measure the changed conditions beginning with the tax period we find that a comparison of the statutory base period with the 1936 crop discloses a margin for the base period of \$0.01354 (R. 35); and a margin for the 1936 crop

period of $0.01582 (R. 67), an increase of $0.00228. Assuming that the statute requires an adjustment of the base period margins instead of making a comparison with the 1936 crop to the exclusion of the base period, we reach an adjusted margin for the base period of $0.01582, arrived at by adding to the margin for the base period the increase in the 1936 crop ($0.01354 plus $0.00228); and a comparison of the adjusted base period of $0.01582 with the tax period margin of $0.01192, results in a margin $0.00390 lower in the tax period than it was during the base period, and a full burden of the tax borne by Webre.

Testing the results by a comparison of the Gross Sales Value alone we find the Gross Sales Value higher after the tax was invalidated than it was for the tax period. The Gross Sales Value for the tax period was $0.03826 per unit ($161,853.86 divided by 5,444,064) (R. 35) and the Gross Sales Value for the 1936 crop amounts to $0.03351 per unit (R. 66).

We contend, therefore, that the 1936 crop experience is pertinent evidence with demonstrated probative value to establish that Webre bore the entire burden of the tax; and that the amount realized on sale would have been realized even if there had been no tax.

During the period from January 6, 1936 to August 1, 1937 the quota control provisions of the Jones-Costigan Sugar Act remained in full force and effect. On September 1, 1937 a new excise tax on sugar went into effect and the quota control system was continued (50 Stat. 903).

We have no less an authority than the President of the United States that a tax amounting to 150 per cent of the processing tax we are concerned with would not affect the price of sugar to the consumer. What affects the price is the quota control system and the amount realized during the tax period would have been realized even if there had been no tax.

The President of the United States in his message to Congress, dated March 1, 1937 (infra 78), stated in part:

"Quotas influence the price of sugar through the control of supply; consequently, under a quota regulation of the supply of sugar, a tax may be levied without causing any adverse effect, over a period of time, on the price paid by consumers.

I recommend to the Congress the enactment of an excise tax at the rate of not less than .75 cent per pound of sugar, raw value. I am definitely advised that such a tax would not increase the average cost of sugar to consumers. * * *"

In support of the President's recommendations to Congress, Secretary of Agriculture Wallace issued a press release on March 15, 1937 wherein he analyzed the effects of the tax on sugar. That part of the press release is set forth in the Appendix hereto (infra 79-81).

Can any doubt remain that the 1936 crop experience—which confirms the very definite statement of the President to Congress that the tax would not, under the legislative quota system, be passed on—lacks probative value?

CONCLUSION.

All the authorities, excepting the Fifth Circuit, appear to be very much in accord in construing Section 907 in a manner that will permit that section to give the necessary relief and at the same time protect the revenue.

The Government in concluding its brief in *Anniston Manufacturing Co. v. Davis* (301 U. S. 337) asking this Court to uphold the constitutionality of the legislation states at pages 162-163:

"We also admit that an absolute and theoretically perfect precision of analysis of the extent of tax absorption will probably not always be obtained in practice. The accounting and economic problems in some cases will be complex and difficult. * * * However, we entertain no doubt that 'fair and reasonable approximations' can be reached in every case."

We concur in that summation and rest content that the instant case presents no insurmountable difficulties.

WHEREFORE, because of the errors herein mentioned, your petitioner respectfully asks that the decision of the United States Circuit Court of Appeals be reversed on both petitions; and that the decision of the Board be modified to award a refund of the full amount of tax paid, i.e., $8,169.97.

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November, 1944.

APPENDIX.

Revenue Act of 1936, c. 690, 49 Stat. 1648, 1747:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

SEC. 901. REPEALS.

Sections 21 (d), 21 (e), and 21 (g) of the Agricultural Adjustment Act, as amended, are hereby repealed.

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under Section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not en-

titled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

SEC. 903. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.

SEC. 904. STATUTE OF LIMITATIONS.

Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court for the recovery, recoupment, set-off, refund, or credit of, or counterclaim for, any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this title, unless the Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which said suit or proceeding relates. Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought.

SEC. 905. JURISDICTION OF COURTS.

Concurrent with the Court of Claims, the District Courts of the United States (except as provided in section 906 of this title) shall have jurisdiction of cases to which this title applies, regardless of the amount in controversy, if such district courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy. The United States Customs Court shall not have jurisdiction of any such cases.

SEC. 906. PROCEDURE ON CLAIMS FOR REFUNDS OF PROCESSING TAXES.

(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. The Commissioner shall allow or disallow, in whole or in part, any claim for refund of any such amount within three years after such claim was filed, unless such time has been extended by written consent of the claimant.

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). The Board shall be composed of nine members who shall be officers or employees of the Treasury Department designated by the Secretary of the Treasury. One of such members shall be designated by the Secretary to act as chairman of the Board. The chairman may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member designate the chief thereof. A majority of the members of the Board or of any division thereof shall constitute a quorum for the transaction of the business of the Board or of the division respectively. A vacancy in the Board or in any division thereof shall not impair the powers nor affect the duties of the Board or division nor of the remaining members of the Board or division respectively. The Secretary of the Treasury shall assign to the Board such personnel in the Treasury Department as may be necessary to perform its

functions. The Board shall have jurisdiction in proceedings under this section to review the allowance or disallowance of the Commissioner of a claim for refund, and to determine the amount of refund due any claimant with respect to such claim. The Commissioner shall make refund of any such amount determined by a decision of the Board which has become final. The proceedings of the Board and its divisions shall be conducted in accordance with such rules and regulations as the Board may prescribe, with the approval of the Secretary.

(c) The allowance or disallowance of the Commissioner of a claim for refund under this section shall be final, unless within three months after the date of mailing by registered mail by the Commissioner of notice that a claim for refund of any such amount has been disallowed, in whole or in part, the claimant files a petition with the Board requesting a hearing on the merits of his claim in whole or in part. Upon the filing of any such petition, the claimant shall be entitled to a hearing as provided herein, and within three months after the date of such filing the Board shall set a date for such hearing which shall be not more than two years from the date of filing of the petition. Such hearing shall be held in Washington, District of Columbia, or in the collection district in which is located the principal place of business of the claimant, as the claimant may designate in his petition, or in any place which may be designated by the Commissioner and the claimant by stipulation in writing, and may be continued from day to day. The Board shall notify the claimant and the Commissioner of the time and place set for such hearing by registered mail.

(d) Each such hearing shall be conducted by a presiding officer who shall be a member of the Board or an officer or employee of the Treasury Department designated a presiding officer by the Secretary of the Treasury, and assigned by the Board to preside at such hearing, and shall be open to the public. The proceedings in such hearings shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe with the approval of the Secretary of the Treasury, and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. The claimant and the Commissioner shall be entitled to be represented

by counsel, to have witnesses subpenaed, and to examine and cross-examine witnesses. The presiding officer shall have authority to administer oaths, examine witnesses, rule on questions of procedure and the admissibility of evidence, and to require by subpena, signed by any member of the Board, the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, records, correspondence, memoranda, and other evidence, from any place in the United States at any designated place of hearing, and to require the taking of a deposition by any designated individual competent to administer oaths. Any witness summoned or whose deposition is taken pursuant to this section shall receive the same fees and mileage as witnesses in the courts of the United States.

(e) The presiding officers shall recommend findings of fact and a decision to the Board or the proper division thereof within six months after the conclusion of the hearing. Briefs with respect to such recommendations may be submitted to the Board or such division on behalf of the Commissioner and the claimant within thirty days after such recommendations have been made, unless such time is extended by the Board or such division. Except upon specific order of the chairman of the Board, no oral argument may be presented to the Board or such division after the conclusion of the hearing. The Board or a division shall make its findings of fact and decision in writing as quickly as practicable. The findings of fact and the decision of a division shall become the findings of fact and decision of the Board within thirty days after they have been made by the division, unless within such period, the chairman has directed that such findings and decision shall be reviewed by the Board. The findings and decision of a division shall not be a part of the record in any case in which the chairman directs that such findings and decision shall be reviewed by the Board. Copies of the findings of fact and decision of the Board shall be mailed to the claimant and the Commissioner by registered mail.

(f) The Board, with the approval of the Secretary of the Treasury, is authorized to draw up a table of costs and fees relating to such hearings, and the preparation of transcripts of record thereof, not to exceed with respect to any one item those charged in the Supreme Court of the United

States. Such costs and fees shall be paid by the claimant and be collected in accordance with such rules and regulations as may be prescribed by the Board, with the approval of the Secretary. If the hearing provided herein results in a modification of the allowance or disallowance of the Commissioner, such costs shall be returned to the claimant.

(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has his principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing, within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. A copy of such petition shall forthwith be served upon the Commissioner or upon any officer designated by him for that purpose, or upon the claimant, according to which party files such petition, and upon the Board. Thereupon the Board shall certify and file in the court, in which such petition has been filed, a transcript of the record upon which the findings and decision complained of were based. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing, as justice may require. No objection shall be considered by the court unless such objection shall have been urged before the Board or division and the presiding officer, or unless there were reasonable grounds for failure so to do. If the claimant or the Commissioner shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence in the hearing before the presiding officer, the court may order such additional evidence to be taken before such officer, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings of fact and decision by

reason of the additional evidence so taken, and it shall file with the court such modified or new findings and decision. The judgment of the court shall be final, subject to review by the Supreme Court of the United States, upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code, as amended. Such courts are authorized to adopt rules for the filing of petitions for review, the preparation of the record for review, and the conduct of the proceedings on review. If the decision of the Board is affirmed, costs shall be awarded against the claimant, and if such decision is reversed, the judgment shall provide for a refund of any costs paid by the claimant. In case of modification of such decision costs shall be awarded or refused as justice may require. The decision of the Board made after the hearing provided herein shall become final in the same manner that decisions of the Board of Tax Appeals become final under section 1005 of the Revenue Act of 1926, as amended.

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so

ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross sales value of articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's

sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity or commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant

shifted to others the burdens of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions

relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others.

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HOUSE OF REPRESENTATIVES

73d Congress 2d Session

Document No. 246.

AMEND THE AGRICULTURAL ADJUSTMENT ACT.

MESSAGE

from

THE PRESIDENT OF THE UNITED STATES

Transmitting

A REQUEST THAT THE AGRICULTURAL ADJUSTMENT ACT BE AMENDED TO MAKE SUGAR BEETS AND SUGARCANE BASIC AGRICULTURAL COMMODITIES.

February 8, 1934.—Referred to the Committee on Agriculture and ordered to be printed.

To the Congress:

Steadily increasing sugar production in the continental United States and in insular regions has created a price and marketing situation prejudicial to virtually everyone interested. Farmers in many areas are threatened with low prices for their beets and cane, and Cuban purchases of our goods have dwindled steadily as her shipments of sugar to this country have declined.

There is a school of thought which believes that sugar ought to be on the free list. This belief is based on the high cost of sugar to the American consuming public.

The annual gross value of the sugar crop to American beet and cane growers is approximately $60,000,000. Those who believe in the free importation of sugar say that the 2 cents a pound tariff is levied mostly to protect this 60-million-dollar crop and that it costs our consuming public every year more than 200 million dollars to afford this protection.

I do not at this time recommend placing sugar on the free list. I feel that we ought first to try out a system of quotas with the three-fold object of keeping down the price

of sugar to consumers, of providing for the retention of beet and cane farming within our continental limits, and also to provide against further expansion of this necessarily expensive industry.

Consumers have not benefitted from the disorganized state of sugar production here and in the insular regions. Both the import tariff and cost of distribution, which together account for the major portion of the consumers' price for sugar, have remained relatively constant during the past 3 years.

This situation clearly calls for remedial action. I believe that we can increase the returns to our own farmers, contribute to the economic rehabilitation of Cuba, provide adequate quotas for the Philippines, Hawaii, Puerto Rico, and the Virgin Islands, and at the same time prevent higher prices to our own consumers.

The problem is difficult but can be solved if it is met squarely and if small temporary gains are sacrificed to ultimate general advantage.

The objective may be attained most readily through amendment of existing legislation. The Agricultural Adjustment Act should be amended to make sugar beets and sugar cane basic agricultural commodities. It then will be possible to collect a processing tax on sugar, the proceeds of which will be used to compensate farmers for holding their production to the quota level. A tax of less than one-half cent per pound would provide sufficient funds.

Consumers need not and should not bear this tax. It is already within the Executive power to reduce the sugar tariff by an amount equal to the tax. In order to make certain that American consumers shall not bear an increased price due to this tax, Congress should provide that the rate of the processing tax shall in no event exceed the amount by which the tariff on sugar is reduced below the present rate of import duty.

By further amendment to the Agricultural Adjustment Act, the Secretary of Agriculture should be given authority to license refiners, importers, and handlers to buy and sell sugar from the various producing areas only in the proportion which recent marketings of such areas bear to total United States consumption. The average marketings of the past 3 years provide on the whole an equitable base, but the base period should be flexible enough to allow slight adjustments as between certain producing areas.

The use of such a base would allow approximately the following preliminary and temporary quotas:

	Short tons
Continental beets	1,450,000
Louisiana and Florida	260,000
Hawaii	935,000
Puerto Rico	821,000
Philippine Islands	1,037,000
Cuba	1,944,000
Virgin islands	5,000
Total	6,452,000

The application of such quotas would immediately adjust market supplies to consumption, and would provide a basis for reduction of production to the needs of the United States market.

Furthermore, in the negotiations for a new treaty between the United States and Cuba to replace the existing Commercial Convention, which negotiations are to be resumed immediately, favorable consideration will be given to an increase in the existing preferential on Cuban sugars, to an extent compatible with the joint interests of the two countries.

In addition to action made possible by such legislative and treaty changes, the Secretary of Agriculture already has authority to enter into codes and marketing agreements with manufacturers which would permit savings in manufacturing and distributing costs. If any agreements or codes are entered into, they should be in such form as to assure that producers and consumers share in the resulting savings.

Frankin D. Roosevelt.

The White House, February 8, 1934.

Agricultural Adjustment Act, c. 641, 49 Stat. 770-771.

Sec. 30. The Agricultural Adjustment Act, as amended, is amended by adding after section 20 the following new section:

Sec. 21. * * * * * * *

(d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counter claim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

(2) In the event that any tax imposed by this title is finally held invalid by reason of any provision of the Constitution, or is finally held invalid by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, there shall be refunded or credited to any person (not a processor or other person who paid the tax) who would have been entitled to a refund or credit pursuant to the provisions of subsections (a) and (b) of section 16, had the tax terminated by proclamation pursuant to the provisions of section 13, and in lieu thereof, a sum in an amount equivalent to the amount to which such person would have been entitled had the Act

been valid and had the tax with respect to the particular commodity terminated immediately prior to the effective date of such holding of invalidity, subject, however, to the following condition: Such claimant shall establish to the satisfaction of the Commissioner, and the Commissioner shall find and declare of record, after due notice by the Commissioner to the claimant and opportunity for hearing, that the amount of the tax paid upon the processing of the commodity used in the floor stocks with respect to which the claim is made is included by the processor or other person who paid the tax in the price of such stocks (or of the material from which such stocks were made). In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. Notwithstanding any other provision of law: (1) no suit or proceeding for the recovery, recoupment, set-off, refund or credit of any tax imposed by this title, or of any penalty or interest, which is based upon the invalidity of such tax by reason of any provision of the Constitution or by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefor (conforming to such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled thereto; (2) no such suit or proceeding shall be begun before the expiration of one year from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after such disallowance notify the taxpayer thereof by mail.

(3) The District Courts of the United States shall have jurisdiction of cases to which this subsection applies, regardless of the amount in controversy, if such courts would have had jurisdiction of such cases but for limitations

under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy.

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Jones-Costigan Act, c. 263, 48 Stat. 672-674.

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Sec. 4. Section 8 of the Agricultural Adjustment Act, as amended, is amended by adding at the end thereof the following new section:

Sec. 8a. (1) Having due regard to the welfare of domestic producers and to the protection of domestic consumers and to a just relation between the prices received by domestic producers and the prices paid by domestic consumers, the Secretary of Agriculture may, in order to effectuate the declared policy of this Act, from time to time, by orders or regulations—

(A) (i) Forbid processors, handlers of sugar, and others from importing sugar into continental United States for consumption, or which shall be consumed, therein, and/or from transporting to, receiving in, processing or marketing in, continental United States, and/or from processing in any area to which the provisions of this title with respect to sugar beets and sugarcane may be made applicable, for consumption in continental United States, sugar from the Virgin Islands, the Philippine Islands, the Canal Zone, American Samoa, the island of Guam, and from foreign countries, including Cuba, respectively, in excess of quotas fixed by the Secretary of Agriculture, for any calendar year, based on average quantities therefrom brought into or imported into continental United States for consumption, or which was actually consumed, therein, during such three years, respectively, in the years 1925-1933, inclusive, as the Secretary of Agriculture may, from time to time, determine to be the most representative respective three years, adjusted, together with the quotas established pursuant to paragraph (ii), (in such manner as the Secretary shall determine) to the remainder of the total estimated consumption requirements of sugar for continental United States, determined pursuant to subsection (2) of this section, after deducting therefrom the quotas for continental United States, provided for by paragraph (b) of this sub-

section: *Provided, however,* That in such quotas there may be included, in the case of the Virgin Islands, the Philippine Islands, the Canal Zone, American Samoa, and the island of Guam, direct-consumption sugar up to an amount not exceeding the respective quantities of direct-consumption sugar therefrom brought into or imported into continental United States for consumption, or which was actually consumed, therein during the year 1931, 1932, or 1933, whichever is greater, and in the case of Cuba, direct-consumption sugar up to an amount not exceeding 22 per centum of the quota established for Cuba: *And provided further,* That any imported sugar, with respect to which a drawback of duty is allowed, under the provisions of section 313 of the Tariff Act of 1930, shall not be charged against the quota established by the Secretary of Agriculture hereunder for the country from which such sugar was imported, and the Secretary of Agriculture may, by orders or regulations, readjust any quota subject to the provisions of this section, except quotas fixed by paragraph (B) of this subsection; and may allot (or appoint an officer, including the Governor General of the Philippine Islands for that area, in his name to allot)any quota, and readjust any such allotment, from time to time, among the processors, handlers of sugar and others; and/or

ii) Forbid processors, handlers of sugar, and others from transporting to, receiving in, processing or marketing in, continental United States, and/or from processing in the Territory of Hawaii or Puerto Rico for consumption in continental United States, sugar from the Territory of Hawaii or Puerto Rico, in excess of quotas fixed by the Secretary of Agriculture, for any calendar year, based on average quantities therefrom brought into continental United States for consumption, or which was actually consumed, therein during such three years, respectively, in the years 1925-1933, inclusive, as the Secretary of Agriculture may, from time to time, determine to be the most representative respective three years, adjusted, together with the quotas established pursuant to paragraph (i), (in such manner as the Secretary shall determine) to the remainder of the total estimated consumption requirements of sugar for continental United States, determined pursuant to subsection (2) of this section, after deducting therefrom the quotas for continental United States, provided for by para-

graph (B) of this subsection: *Provided, however,* That in such quotas there may be included direct-consumption sugar up to an amount not exceeding the respective quantities of direct-consumption sugar therefrom brought into continental United States for consumption, or which was actually consumed, therein during the year 1931, 1932, or 1933, whichever is greater, and the Secretary of Agriculture may, by orders or regulations, allot such quotas and readjust any such allotments, from time to time, among the processors, handlers of sugar, and others; and/or

(B) Forbid processors, handlers of sugar, and others from marketing in, or in the current of, or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce, sugar manufactured from sugar beets and/or sugarcane, produced in the continental United States beet-sugar-producing area, the States of Louisiana and Florida, and any other State or States in excess of the following quotas, for any calendar year, except as provided for in subsection (2) of this section: United States beet-sugar area, one million five hundred and fifty thousand short tons raw value; the States of Louisiana and Florida, except as may be provided under paragraph (C) of this subsection, two hundred and sixty thousand short tons raw value; and the Secretary of Agriculture may, by orders or regulations, allot such quotas and readjust any such allotment, from time to time, among the processors, handlers of sugar, and others; and/or

(C) For any calendar year, determine the quota, but not less than the quota provided in paragraph (B), for any area producing less than two hundred and fifty thousand long tons of sugar raw value during the next preceding calendar year; and/or

(D) Establish a separate quota or quotas for edible molasses and/or sirup of cane juice produced in continental United States, in addition to, and/or for edible molasses, sirups, and sugar mixtures produced in any other area or areas to which this title relates, as part of or in addition to, the quotas established pursuant to paragraphs (A) to (C), inclusive, of this subsection, for use as such and not for the extraction of sugar.

(2) (A) The consumption requirements of sugar for continental United States, for the calendar year 1934, and for each succeeding calendar year, shall be determined by the Secretary of Agriculture from available statistics of the Department of Agriculture. The consumption requirements so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy and the purposes of this Act, be adjusted by him to meet the actual requirements of the consumer as determined by the Secretary.

(B) In the event that available statistics of the Department of Agriculture during the course of any calendar year indicate that the consumption requirements of sugar for continental United States for such calendar year will exceed the amount of the consumption requirements determined for that year, the Secretary of Agriculture may prorate such estimated excess amount on the basis of the respective quotas determined by and pursuant to subsection (1) of this section: *Provided, however*, That for each calendar year there shall be allotted to continental United States not less than 30 per centum of any amount of consumption requirements therefor above six million four hundred and fifty-two thousand short tons raw value.

(C) In the event that available statistics of the Department of Agriculture during the course of any calendar year indicate that the consumption requirements of sugar for continental United States for such year will be less than the amount of the consumption requirements determined for that year, the amount of such deficiency may be proportionately deducted from the respective quotas determined by and pursuant to paragraph (A) of subsection (1) of this section.

(D) If, during any calendar year, any producing area is unable to produce and deliver its full quota of sugar, the Secretary of Agriculture may prorate this deficiency among the other areas on the basis of their respective quotas and ability to supply the deficiency.

(E) Notwithstanding the provisions of paragraphs (A) to (C), inclusive, of subsection (1) of this section, the Secretary of Agriculture may, in order to effectuate the declared policy of this Act, from time to time, by orders or regulations, deduct from the quotas for production, im-

porting, receiving, and/or marketing, and/or from the allotments thereof, established pursuant to said paragraphs, in any given year, an amount for each year, respectively, representing the surplus stocks of sugar produced in that area, or a portion of the total surplus stocks of sugar produced in that area, in whole or in part, which may have accumulated in the year next preceding, over and above the quotas established for such year.

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HOUSE OF REPRESENTATIVES.

75th Congress 1st Session.

Document No. 156.

RECOMMENDATION REGARDING ENACTMENT OF THE SUGAR QUOTA SYSTEM.

MESSAGE

from

THE PRESIDENT OF THE UNITED STATES.

Transmitting

A RECOMMENDATION FOR THE ENACTMENT OF THE SUGAR QUOTA SYSTEM, AND ITS NECESSARY COMPLEMENTS.

March 1, 1937.—Referred to the Committee on Agriculture and ordered to be printed.

To the Congress of the United States:

The expiration on December 31, 1937, of the quota provisions of the Jones-Costigan Act and Public Resolution No. 109 of June 19, 1936, and the existence of the public problems which have arisen as a result of discontinuance of the processing tax on sugar and benefit payments to sugar beet and sugarcane producers, make it desirable that the Congress consider the enactment of new legislation with respect to sugar. The Jones-Costigan Act has been useful and effective and it is my belief that its principles should again be made effective.

I therefore recommend to the Congress the enactment of the sugar-quota system, and its necessary complements, which will restore the operation of the principles on which the Jones-Costigan Act was based. In order to accomplish this purpose adequate safeguards would be required to protect the interests of each group concerned. As a safeguard for the protection of consumers I recommend that provision be made to prevent any possible restriction of the

supply of sugar that would result in prices to consumers in excess of those reasonably necessary, together with conditional payments to producers, to maintain the domestic industry as a whole and to make the production of sugar beets and sugarcane as profitable as the production of the principal other agricultural crops. In order to protect the expansion of markets for American exports, I recommend that no decrease be made in the share of other countries in the total quotas.

It is also highly desirable to continue the policy, which was inherent in the Jones-Costigan Act, of effectuating the principle that an industry which desires the protection afforded by a quota system, or a tariff, should be expected to guarantee that it will be a good employer. I recommend, therefore, that the prevention of child labor, and the payment of wages of not less than minimum standards, be included among the conditions for receiving a Federal payment.

I recommend that adequate provision be made to protect the right of both new and old producers of small acreages of sugar beets and sugarcane to an equitable share of the benefits offered by the program. In this connection I suggest also that you consider the advisability of providing for payments at rates for family-size farms higher than those applicable to large operating units.

Quotas influence the price of sugar through the control of supply; consequently, under a quota regulation of the supply of sugar, a tax may be levied without causing any adverse effect, over a period of time, on the price paid by consumers.

I recommend to the Congress the enactment of an excise tax at the rate of not less than 0.75 cent per pound of sugar, raw value. I am definitely advised that such a tax would not increase the average cost of sugar to consumers. An excise tax of this amount would yield approximately $100,000,000 per annum to the Treasury of the United States, which would make the total revenue from sugar more nearly commensurate with that obtained during the period 1922-29. It is also estimated that the total income of foreign countries from the sale of sugar in the United States under the quota system would not be less than that obtained during 1935, and, like the total income of domestic sugar producers,

it can be expected to increase in future years as our consumption requirements expand.

In considering the enactment of any tax the Congress has regard for its social and economic effects as well as its ability to raise revenue. The social and economic effects of an adequate excise tax on sugar are so important to the welfare of the various groups affected as to constitute a necessary complement to the quota system. For this reason I recommend that neither the quotas nor the tax should be operative alone.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,

March 1, 1937.

PRESS RELEASE BY AGRICULTURAL ADJUSTMENT ADMINISTRATION, MARCH 15, 1937. SECRETARY WALLACE ISSUES STATEMENT ON SUGAR

In response to requests received by the Department of Agriculture for information with respect to the sugar quota system and the proposed excise tax on sugar, the Secretary of Agriculture today issued the following statement:

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EFFECTS OF AN EXCISE TAX ON SUGAR UNDER A QUOTA SYSTEM

"On account of the fact that the levy of an excise tax on a commodity usually results, eventually, in an increase in the price equal to approximately the amount of the tax, one is likely to assume that excise taxes increase prices under all conditions; but an excise tax on sugar, within certain limits, under a quota system is one of the exceptions.

"The reason that an excise tax of .75 cent per pound of sugar would not increase over a period of time the price paid by consumers, under a quota system may be stated briefly; the price paid by consumers is determined of course only by the supply and demand for sugar and since neither the supply nor the demand would be changed by the proposed tax, the price paid by consumers would not be affected by the tax.

"Since in most instances the total cost of production (including duties and taxes) tends to be related to selling price, there is generally assumed to be a direct causal relation between cost and price; but in fact the cost of production affects price only indirectly through its effect on supply. If the cost of production exceed price, there is a tendency for production to decrease, and the decreased supply causes an increase in price. Thus it will be noted that the quantity of supply, and not the cost of production, is the direct causal factor in determining price; and factors other than cost of production—in this case quotas—can supersede cost of production in determining supply, and hence in determining price.

"The levy of an excise tax on foreign sugar would of course increase the cost of delivery, but under the quota system the price obtained for sugar sold by foreign producers in United States is greatly in excess of the prices they could obtain in other markets. The amount supplied the American market by such countries would not be decreased, below the total permitted under the quota system, so long as the rate of the tax levied on foreign sugars were not greater than the difference between the duty paid price of sugar in the United States and the sum of the world price of sugar and the American import duty. That differential is approximately $1.50 per hundred pounds at the present time. Consequently, there is a substantial latitude in which duty paid and world prices of sugar could fluctuate, with a tax of 75 cents, before it would become advantageous for foreign producers to decrease the amount of sugar they supply to the American market below the amount permitted to be imported under the quotas.

"The supply of sugar from domestic sources under the quota system would not be affected by the levy of an excise tax so long as federal payments were made to the domestic sugar producers approximately equivalent to the amount of the tax. For these reasons, it appears to be reasonable to assume that the total supply of sugar made available to consumers under the quota system would not be affected by the imposition of an excise tax of 75 cents per hundred pounds. And if neither the supply nor the demand were altered by the levy of a tax, there appears to be no reason to believe that the tax recommended by the President would increase the price of sugar to consumers. Perhaps it should

be noted that although there was a tax of one-half cent per pound of sugar during 1935 and no tax during 1936 the difference in the price paid by consumers in the two years was only one-tenth cent.

"It is generally recognized that since sugar is on an import basis, the import duty, from the standpoint of consumers, is in effect an assessment on all sugar consumed in the United States, although the Government collects revenue only on the imported sugar. The portion of the assessment on consumers not collected by the Government represents the increased income to the domestic industry. Likewise, under a quota system, consumers are in effect assessed an amount equal to the extent to which domestic prices are increased above the world level of prices at which the supply would otherwise be available. Consequently, the levy of an excise tax, which would not cause an increase of the prices to consumers, would constitute merely the substitution of an excise tax for a portion of the existing, but non-revenue producing, assessment on consumers under the quota system.

"In addition to its advantages as a revenue producing measure, an excise tax on sugar is also advantageous as a means of assuring domestic producers an equitable income, of preventing child labor, of protecting the right of adult laborers to reasonable wages, and of facilitating the administration of the quota system.

"The experience in administering the former sugar program has shown that the tax of .5 cent per pound was too low a rate either to constitute an adequate source of revenue or to bring about the full social and economic advantage of such a tax."

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